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Author

Holmes, Kennedy

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Shining Another Light on Spousal Rape Exemptions: Spousal Sexual Violence Laws in the #MeToo Era

Kennedy Holmes*

This Note builds on the growing scholarly discourse involving the #MeToo movement and places an importance on discussing the issue of spousal rape in the #MeToo era. It fills a crucial gap in legal scholarship by articulating how sexual violence during marriage persists despite greater attention to sexual violence in the public discourse. There may be a blind spot in the popular discourse surrounding the #MeToo movement. This Note argues that the current conversation around sexual violence in the workplace fails to address the importance of fixing sexual violence in other areas (such as the home). The Centers for Disease Control and Prevention (CDC) reports that 18.3% of women experience some type of sexual violence in their intimate relationships.¹ A majority of states essentially permit these forms of intimate partner violence within state statutes. In response, this Note provides a robust empirical analysis of states' handling of spousal sexual violence. This Note exposes how loopholes in the law remain and how the #MeToo movement can influence the abolishment of these loopholes.

This Note proceeds in four parts. Part I covers the history of the spousal rape privilege and explains both the historical and modern justifications for spousal sexual violence. Part II explores previous feminist movements' impact on the eradication of sexual violence. Next, Part III presents the current spousal exemptions in state statutes. Additionally, Part III tracks any #MeToo era repeals of spousal sexual violence statutes. Finally, Part IV recommends eliminating spousal exemptions to provide a legal remedy for spouses who seek one. Part IV also acknowledges that noncarceral approaches are necessary.

* J.D. Class of 2021, University of California, Irvine School of Law. I would like to thank Professor Michele Goodwin for her guidance and support while writing this Note.

1. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 8 (2018).

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INTRODUCTION

The public exposures of Harvey Weinstein, Bill Cosby, R. Kelly, Donald Trump, and so many others place newfound importance on combating sexual violence.² Many credit the #MeToo movement for the public awareness of these issues.³ The #MeToo movement builds on a program founded by activist Tarana

2. A majority of adults now believe society is not sensitive enough about sexual harassment, whereas twenty years ago a majority of adults believed that society was too sensitive about sexual harassment. Moreover, women are now twenty percent more likely to sue if they believe they experienced sexual harassment. Lydia Saad, *Concerns About Sexual Harassment Higher than in 1998*, GALLUP (Nov. 3, 2017), https://news.gallup.com/poll/221216/concerns-sexual-harassment-higher-1998.aspx?g_source=Politics&g_medium=lead&g_campaign=tiles [https://perma.cc/6URX-ZE6F].

3. Nora Stewart, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgement of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693, 1694–95 (2019) (“#MeToo has changed the rules surrounding women’s public discourse. As distinct from historical feminist movements, it has rapidly become a way to expose women’s realities beyond the confines of the previously acceptable.”); Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017),

Burke “to bring resources, support, and pathways to healing where none existed before.”⁴ According to Burke, the goal of the #MeToo movement is to “galvaniz[e] a broad base of survivors, and work[] to disrupt the systems that allow sexual violence to proliferate in our world.”⁵

By fall 2017, #MeToo had become a nationwide phenomenon.⁶ Responding to allegations against Harvey Weinstein,⁷ actress Alyssa Milano tweeted “[i]f you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”⁸ The tweet achieved Milano’s stated goal: to show the public how prevalent sexual violence is.⁹ Within twenty-four hours, there were almost half a million tweets and twelve million Facebook posts and reactions to #MeToo.¹⁰ Within forty-five days,

<https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [<https://perma.cc/KT48-WP6A>]. The “Silence Breakers,” the celebrities who told their stories about sexual harassment concerning #MeToo, were collectively named Time Magazine Person of the Year in 2017. Time’s editor in chief declared the actions of those on the cover “unleashed one of the highest-velocity shifts in our culture since the 1960s.” Edward Felsenthal, *The Choice*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers-choice/> [<https://perma.cc/NW86-8SP4>] (last visited Dec. 17, 2019).

4. Tarana Burke, *History & Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/HR3G-3XGV>] (last visited Oct. 19, 2020). Burke credits the “inception” of the movement to an encounter with a young girl, Heaven, who told her about the sexual violence that she endured. Burke felt helpless and directed Heaven to speak with a different counselor. It was this emotional quandary that inspired Burke to begin stating “me too” when facing a survivor of sexual assault. Cassandra Santiago & Doug Criss, *An Activist, a Little Girl and the Heartbreaking Origin of ‘Me Too,’* CNN (Oct. 17, 2017, 3:36 PM), <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html> [<https://perma.cc/4VNF-AFKG>] (describing “Me Too” as “a bold declarative statement that ‘I’m not ashamed’ and ‘I’m not alone’”).

5. Burke, *supra* note 4.

6. Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/> [<https://perma.cc/8VYU-BRCQ>] (finding at least 425–800 people accused of sexual misconduct, including allegations against “prominent people across industries” with a “broad range of behavior that spans from serial rape to lewd comments and abuse of power” within the first year of #MeToo).

7. In the fall of 2017, multiple women came forward with accusations that Weinstein sexually harassed or assaulted them. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/AP5T-6KHV>].

8. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976 [http://web.archive.org/web/20210329002353/https://twitter.com/alyssa_milano/status/919659438700670976].

9. Nadja Sayej, *Alyssa Milano on the #MeToo Movement: ‘We’re Not Going to Stand for It Anymore,’* GUARDIAN (Dec. 1, 2017, 7:00 AM), <https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse> [<https://perma.cc/4PGS-X9N7>].

10. Gilbert, *supra* note 3; Courtney Connley, *#MeToo Founder Tarana Burke Has Big Plans for the Movement in 2018*, CNBC (Jan. 19, 2018, 5:25 PM), <https://www.cnbc.com/2018/01/19/metoo-founder-tarana-burke-has-big-plans-for-the-movement-in-2018.html> [<https://perma.cc/8Y4T-VVEK>].

#MeToo spanned eighty-five countries with eighty-five million Facebook posts.¹¹ Within the first year, nineteen million people had tweeted “#MeToo.”¹²

This new wave of activism placed sexual violence in the public consciousness. So far, the movement has sparked a conversation around sexual violence in various sectors including entertainment,¹³ academia,¹⁴ politics,¹⁵ the judiciary,¹⁶ the

11. Sayej, *supra* note 9.

12. Morgan Jerkins, *The Way Forward for Me Too, According to Founder Tarana Burke*, VOX (Oct. 15, 2019, 8:30 AM), <https://www.vox.com/identities/2019/10/15/20910298/tarana-burke-morgan-jerkins> [<https://web.archive.org/web/20210117221703/https://www.vox.com/identities/2019/10/15/20910298/tarana-burke-morgan-jerkins>].

13. See, e.g., Amy Kaufman & Daniel Miller, *Six Women Accuse Filmmaker Brett Ratner of Sexual Harassment or Misconduct*, L.A. TIMES (Nov. 1, 2017, 5:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-allegations-20171101-htmstory.html> [<https://perma.cc/8ZRR-8443>]; Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [<https://perma.cc/EN4A-WCNF>].

14. See, e.g., Maggie Gordon, *‘Me Too’ the ‘End of the Beginning’ of a Movement*, HOUS. CHRON. (Oct. 18, 2017, 11:37 PM), <https://www.houstonchronicle.com/life/article/Me-Too-the-end-of-the-beginning-of-a-movement-12289190.php> [<https://perma.cc/6N8A-WMNU>] (detailing college senior’s sexual harassment from her graduate student supervisor that included inappropriate touching and nonconsensual kissing); Teresa Watanabe, *Banishment of an Acclaimed UC Irvine Professor Sparks Debate Over Whether #MeToo Can Go Too Far*, L.A. TIMES (Oct. 13, 2018, 5:00 AM), <https://www.latimes.com/local/education/la-me-edu-uc-irvine-sexual-misconduct-20181013-story.html> [<https://web.archive.org/web/20210308153136/https://www.latimes.com/local/education/la-me-edu-uc-irvine-sexual-misconduct-20181013-story.html>].

15. See, e.g., Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> [<https://perma.cc/5L8T-FZ7K>]; Matthew Adams & Todd J. Gillman, *Congress Overhauls Harassment Rules After ‘Me Too’ Scandals Involving Blake Farenthold and Others*, DALL. MORNING NEWS (Dec. 13, 2018, 10:33 PM), <https://www.dallasnews.com/news/politics/2018/12/13/congress-overhauls-harassment-rules-after-me-too-scandals-involving-blake-farenthold-and-others/> [<https://perma.cc/K5D3-9UJS>].

16. See, e.g., Batya Ungar-Sargon, *The Kavanaugh Controversy Is a #MeToo Victory – However It Turns Out*, WASH. POST (Sept. 24, 2018, 12:43 PM), <https://www.washingtonpost.com/outlook/2018/09/24/kavanaugh-controversy-is-metoo-victory-however-it-turns-out/> [<https://perma.cc/2MRP-K88D>].

sciences,¹⁷ sports,¹⁸ the military,¹⁹ and religion.²⁰ Additionally, the virality of #MeToo targeted not only sexual violence but also other pressing concerns like complicity, celebrity culture, pay disparity, power structures, and whisper networks.²¹

Yet with all of this progress, the public conversation continues to neglect particular subsets of women.²² #MeToo in the popular discourse may not be focusing enough on some of the most vulnerable to sexual violence: spouses.²³

17. See, e.g., Paige Smith, *Sciences Address Harassment; #MeTooSTEM Wants Funds Cut Too (1)*, BLOOMBERG L. (Dec. 14, 2018, 11:51 AM), <https://news.bloomberglaw.com/daily-labor-report/sciences-address-harassment-metoostem-wants-funds-cut-too-1> [<https://perma.cc/B4WF-VYTW>] (stating at least forty cases relating to workplace harassment in the sciences were filed in 2018, and because of those cases, advocates in #MeTooSTEM proposed eliminating funding from the elite institutions involved); Reshma Jagsi, *Women in Medicine Say #MeToo, Report ‘Appalling’ Experiences*, UNIV. MICH. INST. FOR HEALTHCARE POL’Y & INNOVATION (Dec. 13, 2017), <https://ihpi.umich.edu/news/women-medicine-say-metoo-report-%E2%80%98appalling%E2%80%99-experiences> [<https://perma.cc/GP9M-DDXE>] (stating thirty percent of female physician-scientists reported experiencing sexual harassment by patients, colleagues, and superiors).

18. See, e.g., Eren Orbey, *The Victims of Larry Nassar Who Dared to Come Forward First*, NEW YORKER (May 25, 2019), <https://www.newyorker.com/culture/culture-desk/the-victims-of-larry-nassar-who-dared-to-come-forward-first> [<https://perma.cc/X89F-PUVQ>] (“Media coverage during the trial emphasized the collective courage of his victims, whose cathartic, excoriating chorus coincided with the height of the #MeToo movement.”).

19. See, e.g., Antonietta Rico, *Why Military Women Are Missing from the #MeToo Moment*, TIME (Dec. 12, 2017, 11:27 AM), <https://time.com/5060570/military-women-sexual-assault/> [<https://perma.cc/UHC5-B9JT>] (“It is time for military commanders to face the #MeToo reckoning and be held accountable for the entrenched culture of sexual harassment and assault they have tolerated, and at times, participated in.”).

20. See, e.g., Casey Quackenbush, *The Religious Community Is Speaking Out Against Sexual Violence with #ChurchToo*, TIME (Nov. 22, 2017, 1:34 AM), <https://time.com/5034546/me-too-church-too-sexual-abuse/> [<https://perma.cc/UU6M-4VFH>] (explaining Hannah Paasch and Emily Joy began using the hashtag #churchtoo to tell their stories about abuse within church settings).

21. Megan Garber, *Is #MeToo Too Big?*, ATLANTIC (July 4, 2018), <https://www.theatlantic.com/entertainment/archive/2018/07/is-metoo-too-big/564275/> [<https://perma.cc/2V5M-AJVL>].

22. While not a focus of this Note, one of the largest subsets of women that the popular #MeToo movement neglects are minorities. Out of 1,848 articles that the *New York Times* posted in the first year and a half of #MeToo, only 2.11% addressed survivors who are a racial minority. Within the two percent of articles published, a large portion of them dealt with minority discomfort and feelings of remarginalization in a movement created to care for Black and Brown girls. Meaghan McBride, *#MeToo Means Who?: Shining a Light on the Darkness: A Rhetorical Analysis of Inclusivity and Exclusivity Within the #MeToo Movement* 83–84 (May 19, 2019) (B.A. honors thesis, Dickinson College) (on file with Dickinson Scholar); see also P.R. Lockhart, *Women of Color in Low-Wage Jobs Are Being Overlooked in the #MeToo Moment*, VOX (Dec. 19, 2017, 4:10 PM), <https://www.vox.com/identities/2017/12/19/16620918/sexual-harassment-low-wages-minority-women> [<https://perma.cc/K7UQ-4ZTE>] (“[T]his reckoning has not emboldened victims of harassment to report their experiences equally. The individualized coverage of these cases ignores countless people, many of whom are women of color who . . . work in low-wage jobs where the power imbalance is even less conducive to reporting sexual harassment. And even when the struggles of marginalized communities are reported, their stories are less likely to keep our attention.”).

23. Before #MeToo, the topic of spousal rape was briefly discussed in national news. In 2015, accusations surfaced that Donald Trump raped his first wife. The President’s then lawyer, Michael Cohen, exclaimed that “by the very definition, you can’t rape your spouse.” Tanya Basu, *Donald Trump*

Because Milano's #MeToo tweet responded to the conversation around the Harvey Weinstein scandal, the public conversation linked the #MeToo movement to sexual violence in more public-facing arenas such as the workplace. The link between sexual violence and only public-facing arenas is damaging, however, as sexual violence has a much broader reach. Many of the studies on record related to the prevalence of sexual violence were conducted decades ago.²⁴ However, a recent Centers for Disease Control and Prevention (CDC) study paints a troublesome picture of the lives of those who are in intimate relationships.²⁵

Twenty-two years after the supposed repeal of the spousal rape privilege, the CDC reported that sexual violence in intimate relationships happened to around 18.3% of women.²⁶ The National Institute of Justice found that there were an estimated 322,230 intimate partner rapes committed in one year alone.²⁷ The preceding numbers roughly amount to over seven million women that have experienced intimate partner rape in their lifetime.²⁸ This blind spot in the public

Lawyer Sorry for Saying 'You Can't Rape Your Spouse,' TIME (July 28, 2015, 11:38 AM), <https://time.com/3974560/donald-trump-rape-ivana-michael-cohen/> [https://perma.cc/Z7ER-7BDL]. Several pointed out or corrected Cohen's assertion, Cohen then apologized, and the conversation did not progress. See Dara Lind, *Donald Trump's Lawyer Said It's Legal to Rape Your Spouse. Nope.*, VOX (July 28, 2015, 11:20 AM), <https://www.vox.com/2015/7/28/9057911/donald-trump-rape-ivana> [https://web.archive.org/web/20201111203623/https://www.vox.com/2015/7/28/9057911/donald-trump-rape-ivana] (recognizing that some states do not treat spousal rape equally to stranger rape); Danielle Paquette, *Nearly Half of States Treat Married Women Differently When It Comes to Rape*, WASH. POST (July 29, 2015, 7:23 AM), <https://www.washingtonpost.com/news/wp/2015/07/29/the-ancient-sexist-roots-of-what-donald-trumps-adviser-said-about-rape/> [https://perma.cc/67TU-HTUT] (quoting reactions to Cohen's comment such as "[i]t's absolutely shocking to hear an attorney say something like that in this day and age" from the general counsel at the National Women's Law Center and that the comment was "absurdly behind the times" from the president of Rape, Abuse and Incest National Network); Jill Elaine Hasday, *Donald Trump's Lawyer Was Right: In Some Places, Raping Your Wife Is Still Treated like a Minor Offense*, WASH. POST (July 29, 2015, 10:17 AM), <https://www.washingtonpost.com/posteverything/wp/2015/07/29/donald-trumps-lawyer-was-right-in-some-places-raping-your-wife-is-still-treated-like-a-minor-offense/> [https://perma.cc/G372-9X34] (explaining some form of spousal rape prohibition is codified, but the statutes are "often inadequate" and "under-enforced").

24. See, e.g., DIANA E. H. RUSSELL, RAPE IN MARRIAGE 2 (Ind. Univ. Press 1990) (1982); NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000).

25. See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 1.

26. *Id.* at 8 (including "rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact").

27. NAT'L INST. OF JUST., *supra* note 24, at 25.

28. *Id.* at 26. Historical justifications for spousal rape were written in the context of heterosexual relationships with abuse happening to the women in those relationships. This Note frames these issues within that context. However, sexual assault can happen in any relationship, to anyone, no matter how they identify. The CDC reported that 8.2% of men experience some type of sexual violence in their intimate relationships. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 1, at 9. Additionally, 43.8% of lesbians, 61.1% of bisexual women, 26.0% of gay men, and 37.3% of bisexual men have experienced some form of intimate partner violence. See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 2 (2013).

#MeToo discourse is harmful: the failure of the public conversation to more critically engage with how sexual violence affects married women undermines women's movements to combat rapes and sexual assaults. Therefore, the current conversation around sexual violence must place sufficient importance on closing spousal exemptions.²⁹

The continuance of sexual violence toward married women is due to views embedded in our societal fabric.³⁰ The system supports a power asymmetry between husband and wife that manifests in both legal and social subordination. The focus of this Note is the continued existence of spousal exemptions that enables forms of sexual violence. Historical views of the woman's place in marriage justified spousal rape privileges.³¹ These justifications seeped into U.S. common law³² and eventually were codified in state laws.³³ By 1993, some states had eradicated spousal rape laws.³⁴ Other state legislatures, instead of repealing the exemptions outright, created loopholes that essentially allow husbands to continue the abuse and exploitation of their wives.³⁵ To this day, thirty-eight states have some form of spousal exemption contained in their rape and sexual assault statutes.³⁶

By exploring the state statutes with spousal rape exemptions, this Note exposes how loopholes remain. This Note advances in four parts. Part I chronicles the history of the spousal rape privilege. It highlights the subordination that women have endured and the justifications behind allowing spousal sexual violence.³⁷ Part II examines feminist movements that focused on sexual violence and their role in influencing the progression of equality under sexual violence laws.³⁸ Next, Part III

29. Kennedy and Hausner acknowledge this issue within Maryland's criminal justice system. Christina Kennedy & Deena Hausner, *My Husband Rapes #MeToo: The Persistence of the Marital Rape Exemption*, 52 MD. BAR J., Winter 2019, at 58. Further, other works address the issue of spousal rape since the supposed "repeal" in 1993, but not recently or in correlation with #MeToo. See, e.g., Jill Elaine Hasday, *Consent and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

30. See RUSSELL, *supra* note 24; Olabisi Adurasola Alabi, Note, *Sexual Violence Laws Redefined in the "Me Too" Era: Affirmative Consent & Statutes of Limitations*, 25 WIDENER L. REV. 69, 72–73 (2019).

31. Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 785 (2018) ("[R]ape has been a systemic tool of oppression since the beginning of time, across civilizations, cultures, and contexts."). The framework under which rape laws exist stems from the protection of "male interests." Rape laws support masculine pride and male aggression. These male interests also reflect societal interests at large. Camille E. LeGrand, Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 924–25 (1973).

32. Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489, 491 (1857).

33. See *People v. Liberta*, 474 N.E.2d 567, 570 (N.Y. 1984).

34. See Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1829 (2011) ("[F]orced sex between husband and wife is considered rape and is illegal in every jurisdiction in the United States."); Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L.J. 305, 318 (2003) ("On July 5, 1993, reform advocates reached their goal of abolishing the marital rape exemption.").

35. See *infra* notes 160–163.

36. See *infra* Appendix.

37. See *infra* notes 41–105.

38. See *infra* notes 106–170.

explores spousal exemptions in the #MeToo era. It reviews existing spousal sexual violence statutes and answers whether the public conversation around sexual violence has had any influence on repealing or upholding spousal exemptions.³⁹ Last, Part IV proposes eliminating spousal exemptions and acknowledges the issues faced with doing so.⁴⁰

I. THE SPOUSAL RAPE EXEMPTION

Marital rape has long been inscribed in history tracing back to the days of William Blackstone and Sir Matthew Hale.⁴¹ Part I addresses these historical roots and their implications. Section I.A traces the historical origins of spousal exemptions. Next, Section I.B explains the historical justifications used to support early legal theories. Last, Section I.C describes the modern justifications used today to uphold the allowance of spousal sexual assault.

A. Historical Origins

A woman's place in marriage has "been prescribed by culture and by law."⁴² Contrary to modern companionate marriage, in early English common law, the relationship between husband and wife was akin to an economic contract.⁴³ The marital contract held great deference to husbands, going as far as to "suspend" the rights of the wife.⁴⁴ Any benefit to the marital contract, therefore, was "not for marriage as an entity but for the husband as the marital rights bearer."⁴⁵ Scholars trace this notion to English jurist William Blackstone who stated,

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore . . . under the protection and influence of her husband . . . ; and her condition during her marriage is called her *coverture*.⁴⁶

39. See *infra* notes 171–315.

40. See *infra* notes 316–336.

41. See *infra* notes 42–68 and accompanying text.

42. Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 18 (2017).

43. Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941, 943, 950 (1995); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 421 (Oxford, Clarendon Press 1765) ("Our law considers marriage in no other light than as a civil contract.").

44. See Ryan, *supra* note 43, at 953 ("Subsuming her person meant legally appropriating her will, sexually and otherwise, as the legal presumption of coercion reveals."); BLACKSTONE, *supra* note 43, at 430. However, Blackstone theoretically believed that "women and men approached marriage as theoretical equals to a civil contract." Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 350 (1979).

45. Ryan, *supra* note 43, at 946.

46. BLACKSTONE, *supra* note 43, at 430.

Legal scholars also trace the origins of the spousal rape exemption to English barrister Sir Matthew Hale's theory of implied or irrevocable consent.⁴⁷ Hale exclaimed that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."⁴⁸ Thus, the marital contract forced each participant to adhere to a "hierarchy of rights and duties" where "declining matrimonial intimacy and companionship, is per se a breach of duty, tending to subvert the true ends of marriage."⁴⁹ Taken together, these writings influenced the historical justifications for the spousal rape privilege: implied or irrevocable consent, property, and unity of the family. These legal assertions were rarely questioned throughout the nineteenth century.⁵⁰ These notions and the theory that a husband is unable to rape his wife were first adopted at common law in the United States in *Commonwealth v. Fogerty*.⁵¹

B. Historical Justifications

There are three historical justifications for the allowance of spousal rape. The first is implied or irrevocable consent.⁵² Implicit in the marital contract, the wife gives herself to her husband and, upon giving herself to him, assumes the marital obligation of sex.⁵³ This implicit consent is present at all times during the marital relationship and is irrevocable unless the contract is null.⁵⁴

47. Hasday, *supra* note 29, at 1396–97; Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 353 (1995); Michele Goodwin, *Marital Rape: The Long Arch of Sexual Violence Against Women and Girls*, 109 AJIL UNBOUND 326, 328 (2016).

48. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628 (Philadelphia, R.H. Small 1847) (1736).

49. Ryan, *supra* note 43, at 946; *see also* Hasday, *supra* note 29, at 1400 ("Hale presented a couple's mutual decision to marry as grounds for subjecting wives and husbands to very different obligations and rights. . . . [W]here this agreement gave the husband a right of sexual access to his wife, it bestowed an obligation on the wife to submit.").

50. Hasday, *supra* note 29, at 1396 ("[O]ne of the most striking aspects of the nineteenth-century 'debate' over marital rape is how little debate there actually was in terms of direct exchange between the exemption's legal champions and its critics."); *see also* Parker v. Territory, 59 P. 9, 9–10 (Okla. 1899) ("It is intended that the indictment should contain the averment that the prosecutrix was not the wife of the accused."); State v. Williams, 23 P. 335, 336 (Mont. 1890); People v. Estrada, 53 Cal. 600, 600 (1879) ("It is not necessary to allege that the person who is alleged to have been assaulted was not the wife of the defendant.").

51. *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489, 491 (1857) ("Of course, it would always be competent for a party indicted to show, in defence of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.").

52. One of the core components of #MeToo is the antithesis of this notion. *See* Kennedy & Hausner, *supra* note 29, at 59.

53. Siegel, *supra* note 47, at 354. Even though the United States adopted the implied consent justification from an English Justice, England never adopted the law. Linda Jackson, Note, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 186 (1994).

54. Emily R. Brown, Note, *Changing the Marital Rape Exemption: I Am Chattel(!); Hear Me Roar*, 18 AM. J. TRIAL ADVOC. 657, 658 (1995).

Additionally, cultural ideas of the wife's role support the theory of implied consent.⁵⁵ Blackstone wrote about the influence of the social aspect of these roles—roles “founded in nature.”⁵⁶ Throughout history, men “have been presumed and encouraged to be the aggressors” while women are painted as “passive receivers of such advances.”⁵⁷ Presumed passivity in marriage becomes forced acquiescence to unwanted sexual encounters and also creates difficulties for studies measuring the issue of spousal sexual violence.⁵⁸ These difficulties are present because women are socialized to believe that sexual consent is implicit in marriage and therefore do not acknowledge that consent issues fall within a gray area.⁵⁹ Despite these difficulties, studies still find that many people in intimate relationships encounter forced acquiescence to sex.⁶⁰ Thirty-four percent of women state that some of these instances of sexual violence occur as a result of feeling compelled by their marital duty to have sex with their partners even though they were unwilling.⁶¹ Some women even report that they resort to sexual acquiescence to avoid physical harm.⁶²

The second justification for spousal rape is the theory that a woman was her father's and then her husband's property right.⁶³ In the past, rape was a property crime; therefore, it was impossible for husbands to defile their own belongings.⁶⁴

55. Matthew R. Lyon, Comment, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 283 (2004) (“The defense of the [spousal rape] exemption also stems from a ‘cultural need’ to understand the relationship between a husband and wife as ‘consensual and harmonious.’” (quoting Hasday, *supra* note 29, at 1381)); Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape and Stalking*, 78 MARQ. L. REV. 79, 84 (1994) (“[S]ociety's traditional view of a woman's ‘proper’ role was built upon the systematic domination and subordination of women.”).

56. BLACKSTONE, *supra* note 43, at 410 (“That of *husband and wife*, which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated.”).

57. John Dwight Ingram, *Date Rape: It's Time for “No” to Really Mean “No,”* 21 AM. J. CRIM. L. 3, 7 (1993).

58. RUSSELL, *supra* note 24, at 74, 80.

59. See Harless, *supra* note 34, at 308. When speaking about consent issues, Burke mentioned the socialization that women go through and how this socialization forces women to believe that we must give into “the whims of men.” She states, “There's just so many nuances that we don't cover. . . . [W]hat we've been raised on is media giving us the stranger danger, the person that you see in the dark alley ready to jump you. . . . But more often than not, the reality is we live in the gray areas around sexual violence.” Zenobia Jeffries Warfield, *Me Too Creator Tarana Burke Reminds Us This Is About Black and Brown Survivors*, YES! (Jan. 4, 2018), <https://www.yesmagazine.org/democracy/2018/01/04/me-too-creator-tarana-burke-reminds-us-this-is-about-black-and-brown-survivors/> [https://perma.cc/L8S9-DCM6].

60. RUSSELL, *supra* note 24, at 74–75.

61. RAQUEL KENNEDY BERGEN, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, MARITAL RAPE: NEW RESEARCH AND DIRECTIONS 1 (2006), <http://www.ilcdvp.org/Documents/Marital%20Rape%20Revised.pdf> [https://perma.cc/N3US-GDZQ].

62. See Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 BROOK. J. INT'L L. 153, 184 (2015).

63. See Brown, *supra* note 54, at 658; Siegel, *supra* note 47, at 356; Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 275 (2007).

64. See Siegel, *supra* note 47, at 356.

Similar to the property theory, the third justification for spousal rape is unity of the family.⁶⁵ Blackstone described the family unit as one where the wife suspends her “legal existence,” viewing the familial legal identity as one with the male at the helm.⁶⁶ Under this theory, spousal rape could not exist because a man could not possibly rape himself.⁶⁷ Even though rape laws were “designed to regulate ‘competing male interests in controlling sexual access to females,’”⁶⁸ the influences behind this theory affected not only spousal rape but also subordination in the legal system.⁶⁹

The practice of coverture emerged through a pushback to a “more modern, companionate ideal” of marriage.⁷⁰ Coverture suspended the legal rights of wives.⁷¹ This suspension included the wife’s inability to (1) retain “any earnings they received,”⁷² (2) “sue [or be sued],”⁷³ and (3) make contracts and wills.⁷⁴ Scholars argue that coverture was not “fully realized” in American legal circles.⁷⁵ Nevertheless, while some in the American legal field found the practice of coverture flawed, judges adopted the practice into U.S. common law.⁷⁶ Coverture no longer exists, but its effects linger throughout our legal and cultural spheres.⁷⁷ Even though not directly relating to rape in the plain text, the practice of coverture directly relates to spousal rape as it grants “the husband authority over the wife’s person economically and physically.”⁷⁸

While present in the early application of spousal exemptions, by the twentieth century, these historical justifications were no longer adhered to.⁷⁹ Courts within the United States found the unity of the person and irrevocable consent to be antiquated notions.⁸⁰ For example, in *Trammel v. United States*, the Supreme Court disavowed the unity theory in stating,

65. Jackson, *supra* note 53, at 187.

66. *See id.*

67. Lisa Dawgert Waggoner, *New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption*, 22 N.M. L. REV. 551, 553 (1992); Jackson, *supra* note 53, at 187.

68. Lyon, *supra* note 55, at 282.

69. *See infra* notes 70–78.

70. Basch, *supra* note 44, at 351.

71. Baxter, *supra* note 42, at 18.

72. *Id.*

73. Basch, *supra* note 44, at 347.

74. *Id.*

75. *See* Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 462 (2002).

76. *See* Basch, *supra* note 44, at 352.

77. Zaher, *supra* note 75 (“But the social and legal consequences of the doctrine of coverture were pervasive and have carried over into the present.”); Basch, *supra* note 44, at 346 (noting the “patriarchal construct underpinned all of Anglo-American domestic relations law, and [it] continued to exist long after the enactment of the married women’s property acts of the mid-nineteenth century”).

78. Ryan, *supra* note 43, at 953.

79. *See* Waggoner, *supra* note 67, at 554.

80. *See* Jackson, *supra* note 53, at 188–89.

Nowhere . . . in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside.⁸¹

Social expectations of the role of marriage shifted as “companionate marriage” began to create a “cultural expectation of equality in marriage.”⁸²

C. Modern Justifications

As historical justifications for spousal exemptions gave way to more progressive thinking, the practices that ultimately resulted in women’s subordination persisted. Scholars like Lalenya Siegel note that this is due to “patriarchal notions about women in marriage.”⁸³ Similarly, scholars such as Linda Jackson and Jill Hasday offer four compelling theories to explain the continued prevalence of marital rape: (1) marital privacy, (2) marital reconciliation, (3) evidentiary issues, and (4) the belief that stranger rape is more severe.⁸⁴

Proponents of the first theory, marital privacy, believe that the couple should solve marital disputes within the home.⁸⁵ Directly influenced by coverture rationales, this belief also stems from the importance placed on the home and private relations in U.S. common law.⁸⁶ The drafters of the Model Penal Code supported this theory, stating that the allowance of spousal rape was due to an “unwanted [sic] intrusion of the penal law into the life of the family.”⁸⁷ Common law defines “the home as the institution, the sanctity of which ought not to be disturbed by the state.”⁸⁸ The home is often referred to as the man’s “castle” where he is “free from arbitrary intrusion by government or others.”⁸⁹

Like supporters of the marital privacy theory, proponents of the second theory, marital reconciliation, believe that the couple should be free from legal interference. If the victim reports her husband and legal institutions interfere, then marital reconciliation is much more difficult.⁹⁰ But, as scholars have noted, both the marital privacy and reconciliation theories “protect the middle and upper classes from public scrutiny and shame.”⁹¹ This, in effect, places the right to privacy above

81. *Trammel v. United States*, 445 U.S. 40, 52 (1980).

82. Ryan, *supra* note 43, at 953.

83. Siegel, *supra* note 47, at 358.

84. Jackson, *supra* note 53, at 189; Hasday, *supra* note 29, at 1485.

85. Jackson, *supra* note 53, at 190.

86. See Donna E. Young, “*To the Stars Through Difficulties*”: *The Legal Construction of Private Space and The Wizard of Oz*, 20 S. CAL. INTERDISC. L.J. 135, 142 (2010).

87. Lyon, *supra* note 55, at 282 (quoting MODEL PENAL CODE & COMMENTARIES § 213.1(1) cmt. 8(c) (AM. L. INST. 1980)).

88. Young, *supra* note 86, at 142.

89. Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMANS. 195, 202 (1995).

90. See Jackson, *supra* note 53, at 190.

91. See Harless, *supra* note 34, at 314.

the right to safety.⁹² Alternatively, feminist scholars note that there are situations where the right to privacy and safety are the same. The home can be a “site of refuge” for those who “face discrimination and oppression outside the home.”⁹³

The third theory, regarding evidentiary concerns, is the “most common basis” supporting the continuance of spousal exemptions.⁹⁴ Hale influences this theory. In his writings, he stated that rape “is an accusation easily to be made and hard to be proved.”⁹⁵ Proponents believe that spousal rape cases are difficult to prove because it would be difficult to figure out which acts were and were not consensual due to the nature of the marital relationship.⁹⁶ Further, this theory portrays the women as vindictive, having “something to gain, either in divorce, custody, or finance.”⁹⁷

The fourth theory states spousal rape is less harmful than stranger rape.⁹⁸ On the contrary, society’s insistence that spousal exemptions remain in state statutes harms married women in multiple ways. The laws reinforce the notion that women are their husbands’ property.⁹⁹ The laws “depriv[e] women of control over their reproductive capacity.”¹⁰⁰ Additionally, spousal exemptions inhibit women’s

92. See Hasday, *supra* note 29, at 1491; McClain, *supra* note 89, at 210–11 (“Women’s formal constitutional rights to privacy against the state mean little, the argument goes, if what women really need is protection by the state against men in private.”).

93. McClain, *supra* note 89, at 212.

94. Jackson, *supra* note 53, at 191.

95. HALE, *supra* note 48, at 634. #MeToo’s critics have similar misgivings about the movement and argue that it has gone too far. Some state that the movement’s inability to explain the nuances between rape, sexual harassment, and uncomfortable situations does a disservice and aides in these types of justifications. See Daphne Merkin, Opinion, *Publicly, We Say #MeToo. Privately, We Have Misgivings.*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> [<https://perma.cc/9ZVC-RPJ3>] (“These are scary times, for women as well as men. There is an inquisitorial whiff in the air, and my particular fear is that in true American fashion, all subtlety and reflection is being lost.”).

96. See Siegel, *supra* note 47, at 360. Nevertheless, this has not stopped legislatures from enacting laws criminalizing stranger rape. One must make an illogical inference to only codify these justifications at the expense of spouses. LeGrand, *supra* note 31, at 926 (“[I]f a woman suffers no less pain, humiliation, or fear from forcible sexual penetration by her husband than by a relative, a boyfriend, or a stranger, the difference is not great enough to warrant the total insulation of the former but not the latter from legal sanction.”).

97. Klarfeld, *supra* note 34, at 1836.

98. Keith Burgess-Jackson, *Wife Rape*, 12 PUB. AFFS. Q. 1, 6 (1998) (explaining proponents state “though the wife may suffer indignity and shock as a result of [her husband’s] action her suffering is incomparably less than that of the victim of the typical rape”).

99. See Brown, *supra* note 54, at 658–59.

100. Hasday, *supra* note 29, at 1493. Though less of a concern when contraception and abortion are an “alternate means of limiting fertility.” *Id.* Nevertheless, states that continue to permit spousal rape have some of the most restrictive abortion access in the country. See Jessica GlENZA, *Ohio Bill Orders Doctors to ‘Reimplant Ectopic Pregnancy’ or Face ‘Abortion Murder’ Charges*, GUARDIAN (Nov. 29, 2019, 3:54 AM), <https://www.theguardian.com/us-news/2019/nov/29/ohio-extreme-abortion-bill-reimplant-ectopic-pregnancy> [<https://perma.cc/L6MP-7Q6V>].

autonomy over their bodies¹⁰¹ and their expression of their sexual identities.¹⁰² Moreover, women who experience spousal rape can develop post-traumatic stress disorder and experience severe physical issues.¹⁰³ Furthermore, spousal rape “is more susceptible to repeated occurrences” because of the nature of the offender and victim’s relationship.¹⁰⁴

Even though the historical justifications are no longer cited, as evidenced above, the modern justifications are just as unfounded. With varying success, women’s movements have pushed back on both sets of theories throughout the nation’s history.¹⁰⁵ These movements, explained in Part II, did progress statutes in the spousal rape space, but it may not have been enough to fully repeal spousal exemptions.

II. FEMINIST MOVEMENTS TARGETING SPOUSAL RAPE, THEIR EFFORTS, AND THEIR SUCCESSES

As Part I illustrated, spousal rape has been present and legitimized throughout American history. However, during the time of Blackstone and Hale, the period of coverture, and while experiencing coverture’s effects, women consistently fought for bodily autonomy and equality. Part II analyzes this dynamic. Section II.A recounts women’s movements in the nineteenth century and explains the movements’ fight to eliminate rape in the women’s communities and to repeal the practice of coverture. Section II.B describes women’s movements in the twentieth century. It follows activists’ and scholars’ work to push rape into the public consciousness and the difficulty that these groups faced when dealing with spousal rape. Last, Section II.C explains the results from the previously mentioned activism and loopholes created under the guise of legal reform.

A. Nineteenth Century Feminist Movements

Serious movements to combat rape began in the nineteenth century with activists concerned about the brutality inflicted against enslaved Black women.¹⁰⁶ During enslavement and Reconstruction, white men were able to rape Black women

101. *People v. De Stefano*, 467 N.Y.S.2d 506, 514 (Cnty. Ct. 1983) (inferring that the allowance of spousal exemptions would interfere with a “wife’s bodily integrity”).

102. Hasday, *supra* note 29, at 1493–94 (“[A] marital rape victim loses the ability to determine her sexual ‘actions, pleasures, and desires free from external influence.’” (quoting Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 69 (1990))).

103. Erin K. Jackson, *To Have and to Hold: Protecting the Sexual Integrity of the World’s Married Women*, 49 U. TOL. L. REV. 71, 74 (2017) (stating that 45.9% of the women from a study of battered women who had experienced spousal rape developed the disorder and that women experience “[a]bdominal cramping and pain,” “higher rates of cervical cancer,” and “sexually transmitted infections”).

104. Rene I. Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559, 572 (1990–91).

105. See Hasday, *supra* note 29, at 1413–14.

106. See Cynthia Enloe & J. of Int’l Affs., *Hypermasculinity and #MeToo: Backlash and Hurdles in Feminist Movements*, 72 J. INT’L AFFS. 119, 120 (2019); ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION* 76–77 (2013).

without penalty.¹⁰⁷ Rape was punishable by law, but because the law considered Black women to be chattel, they legally could not be victims.¹⁰⁸ Consider Celia, a slave girl who killed the man who purchased and then continuously raped her.¹⁰⁹ Due to her legal status as chattel, she could not claim self-defense.¹¹⁰ Thus, she was not covered by the defense statute, which stated that women could defend themselves from “every person who shall take any woman, unlawfully, against her will, with intent to compel her by force, menace or duress . . . to be defiled.”¹¹¹ Infuriated by these constant sexual assaults, Black activists tried to place rape in the public conversation.¹¹² These women focused on the lack of accountability society afforded white men for raping Black women.¹¹³ Activists set their sights on criminalizing “the licentious man” and received a victory when seduction by an acquaintance became criminalized.¹¹⁴

Around the same time, women criticized certain aspects of a woman’s place in the home.¹¹⁵ They declared that coverture laws were a serious issue plaguing the nation and stated that coverture was essentially a woman’s civil death.¹¹⁶ They further criticized violence in the home, such as the practice of administering “chastisement.”¹¹⁷ Suffragists argued that aspects of the government were male dominated—even juries—and were to blame for rampant sexual assault.¹¹⁸ They believed that if women had certain rights of citizenship, they could infiltrate power structures and “undermine rape by influencing the law.”¹¹⁹ Spousal rape became a specific issue of concern. For example, in 1871, a suffragist questioned what “makes obligatory the rendering of marital rights and compulsory maternity.”¹²⁰

The culmination of these movements placed sexual violence in the public domain. Throughout the nineteenth century, women’s rights movements continued to fight for the elimination of coverture laws and “contested a husband’s right to

107. FREEDMAN, *supra* note 106, at 15, 19, 80; Wilma King, “Prematurely Knowing of Evil Things”: The Sexual Abuse of African American Girls and Young Women in Slavery and Freedom, 99 J. AFR. AM. HIST. 173, 174–79 (2014).

108. *See* King, *supra* note 107, at 173.

109. *Id.* at 179.

110. *Id.*

111. *Id.* (quoting MO. REV. STAT. § 47.029 (1845)).

112. FREEDMAN, *supra* note 106, at 79–80.

113. *See id.* at 76–77.

114. Estelle B. Freedman, Opinion, *Women’s Long Battle to Define Rape*, WASH. POST (Aug. 24, 2012), https://www.washingtonpost.com/opinions/womens-long-battle-to-define-rape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010_story.html [https://perma.cc/QLK5-LPAF].

115. *See* Hasday, *supra* note 29, at 1413.

116. *See id.* at 1413 n.132; Zaher, *supra* note 75.

117. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 14 (2000).

118. FREEDMAN, *supra* note 106, at 54.

119. *See id.* at 54.

120. DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 4 (1985).

determine the terms of marital intercourse vociferously and profoundly.”¹²¹ Activists were able to claim victory when states began to pass the Married Women’s Property Act, essentially abolishing coverture.¹²² However, as time passed, women at the forefront of the suffragist movement did not believe it was politically expedient to continue addressing spousal rape.¹²³

B. Twentieth Century Feminist Movements

It was not until the 1970s when feminist activists such as Laura X began targeting rape laws that male-dominated legal institutions began to make a more meaningful legal change.¹²⁴ These activists had various goals. They wanted to “improv[e] the legal response to rape, provid[e] services for rape victims, and reform[] states’ rape laws” for all forms of rape.¹²⁵ In response “to growing public concern about increases in reports of rape,” activists placed increased importance on tackling the nation’s rape crisis.¹²⁶ To effectively effect reform, these women tried to “broaden the crime of rape.”¹²⁷ To do so, some feminist activists found unlikely allies and worked with “conservative law-and-order groups.”¹²⁸ Other feminist activists worked in tandem with the battered women’s movement.¹²⁹ This group framed rape as a “means of male control over women and the product of a patriarchal society.”¹³⁰ This framing challenged the traditional importance placed on the sanctity of the home and pushed rape into the public domain.¹³¹ Within this framing, the elimination of spousal rape became one of the principal issues of the feminist campaign.¹³²

Laura X was one of the driving forces behind the efforts to repeal the spousal rape privilege. She led the National Clearinghouse on Marital and Date Rape, which claims to have “transform[ed] the attitudes” in the United States through a “20-year

121. See Hasday, *supra* note 29, at 1413–14.

122. See Klarfeld, *supra* note 34, at 1826.

123. FREEDMAN, *supra* note 106, at 63–71; see Hasday, *supra* note 29, at 1482 (“As the feminist movement increasingly turned its attention to suffrage in the early twentieth century and then lost much of its organizational spark after suffrage was won, debate over marital rape dwindled.”).

124. See Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 121 (1999) (“Women’s groups . . . lobbied state legislatures to revise antiquated rape laws . . .”).

125. Jennifer McMahon-Howard, Jody Clay-Warner & Linda Renzulli, *Criminalizing Spousal Rape: The Diffusion of Legal Reforms*, 52 SOCIO. PERSPS. 505, 507 (2009).

126. Spohn, *supra* note 124, at 120–21.

127. McMahon-Howard et al., *supra* note 125, at 507.

128. *Id.*

129. See Schelong, *supra* note 55, at 95–96.

130. Abrams, *supra* note 31, at 753; see Spohn, *supra* note 124, at 121 (noting that, with this framing in mind, activists lobbied legislatures to change “the definition of rape and the evidentiary rules applied in rape cases [as a means of] . . . symboliz[ing] a rejection of this patriarchal view and . . . embody[ing] in law the notion that rape is a crime of violence”).

131. See Abrams, *supra* note 31, at 753.

132. Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHL-KENT L. REV. 951, 961 n.41 (2000).

campaign[] to change customs, policies, behaviors, and laws.”¹³³ In this role, X also worked as a consultant for state campaigns to eliminate the spousal rape exemption.¹³⁴

Additionally, feminist scholars highlighted the role of male domination in the private sphere and the connection with spousal rape.¹³⁵ The scholars displayed how an insistence on privacy made “violence against women legally and politically invisible.”¹³⁶ In the 1980s, Finkelhor and Yllo published *License to Rape*, which studied marital rape, its effects, and the husband’s motives for committing sexual violence.¹³⁷ Diana Russell further deepened academic understanding of spousal rape when she published a comprehensive study of women who have experienced it in *Rape in Marriage*.¹³⁸

C. Legislative and Judicial Repeal

The elimination of spousal exemptions occurred through legislative and judicial repeal.¹³⁹ The first state to legislatively change its spousal rape laws was Nebraska in 1976,¹⁴⁰ followed by Oregon in 1977.¹⁴¹ The following year, Oregon charged John Rideout with spousal rape, the first husband so charged in the United States.¹⁴² Greta Rideout stated that John had told her she should “do what [he] want[s]” since she was “[his] wife.”¹⁴³ When she refused, he began to physically and sexually abuse her.¹⁴⁴ Even though John Rideout was ultimately acquitted, the Rideout case “brought the issues of marital rape to the forefront of the nation’s awareness.”¹⁴⁵ In 1979, in Massachusetts, James Chretien became the first man

133. NAT’L CLEARINGHOUSE ON MARITAL & DATE RAPE/WOMEN’S HIST. LIBR., <https://ncmdr.org> [<https://perma.cc/N3XN-4GU6>] (Nov. 25, 2005).

134. *About Laura X*, NAT’L CLEARINGHOUSE ON MARITAL & DATE RAPE/WOMEN’S HIST. LIBR., <https://ncmdr.org/aboutlx.html> [<https://perma.cc/QB6V-XADT>] (last visited April 2, 2021).

135. See Elaine K. Martin, Casey T. Taft & Patricia A. Resick, *A Review of Marital Rape*, 12 AGGRESSION & VIOLENT BEHAV. 329 (2007).

136. Goldfarb, *supra* note 117, at 5.

137. FINKELHOR & YLLO, *supra* note 120.

138. RUSSELL, *supra* note 24.

139. Siegel, *supra* note 47, at 352.

140. *Id.* at 364.

141. *Id.*

142. Cynthia Gorney, *Oregonian Wins Acquittal of Charge He Raped Wife*, WASH. POST (Dec. 28, 1978), <https://www.washingtonpost.com/archive/politics/1978/12/28/oregonian-wins-acquittal-of-charge-he-raped-wife/513d16dc-bae7-4555-9b09-873244c8406c/> [<https://perma.cc/67J5-N5TM>].

143. *Id.*

144. *Id.*

145. Siegel, *supra* note 47, at 365. Rideout, however, would find himself in court again in 2017 charged with raping two women—one of whom was an ex-girlfriend. Andrew Selsky, *Oregon Man Accused of Raping His Wife in 1978 Gets 16 Years in Other Sex Assaults*, SEATTLE TIMES (Mar. 19, 2017, 5:28 PM), <https://www.seattletimes.com/seattle-news/oregon-man-accused-of-raping-his-wife-in-1978-gets-16-years-in-other-sex-assaults/> [<https://perma.cc/7GQ3-GN4Q>].

convicted of spousal rape for threatening to kill his wife if she did not have sex with him.¹⁴⁶

In 1984, New York judicially repealed a spousal rape exemption in *People v. Liberta*.¹⁴⁷ *Liberta* involved an abusive husband who, because of domestic violence, received a court order to stay away from his wife.¹⁴⁸ The couple did not adhere to the order.¹⁴⁹ While meeting at a motel, Mario Liberta attacked his wife and forced her to engage in sexual acts.¹⁵⁰ He also forced her to make their son watch as Mario profusely violated her.¹⁵¹ After charges of rape and sodomy in the first degree, Mario moved to waive them under the New York spousal exemption.¹⁵² The Court of Appeals of New York ruled that there was no rational basis to distinguish rapes based on the parties' marital status and declared the statute unconstitutional.¹⁵³ The *Liberta* court also disavowed the marital privacy justification, stating that privacy does not reach violent acts.¹⁵⁴

By 1993, every state had amended its spousal rape laws (either judicially or legislatively), with North Carolina as the last.¹⁵⁵ After North Carolina's repeal, Laura X asserted that the pursuance against spousal rape "chang[ed] by leaps and bounds."¹⁵⁶ Nevertheless, the repeal in many states was a façade: the new laws still subjected women to the legal possibility of spousal sexual violence but without explicit language doing so.¹⁵⁷ States prevented rape reform bills from fully repealing the spousal rape privileges.¹⁵⁸ Legislatures resisted their elimination and the legislative compromise resulted in laws containing various loopholes.¹⁵⁹

Instead of repealing spousal exemptions outright through the legislative compromises, states created categories of loopholes including (1) punishing spousal rape separately,¹⁶⁰ (2) barring marriage as a defense only to rape in the first

146. Commonwealth v. Chretien, 417 N.E.2d 1203, 1205 (Mass. 1981).

147. See Waggoner, *supra* note 67, at 557–58.

148. People v. Liberta, 474 N.E.2d 567, 569–70 (N.Y. 1984).

149. *Id.* at 569.

150. *Id.*

151. *Id.*

152. *Id.* at 570. (“[D]ue to the ‘not married’ language in the definitions of ‘female’ and ‘deviate sexual intercourse,’ there is a ‘marital exemption’ for both forcible rape and forcible sodomy.”).

153. *Id.* at 573.

154. *Id.* at 574 (“While protecting marital privacy and encouraging reconciliation are legitimate State interests, there is no rational relation between allowing a husband to forcibly rape his wife and these interests.”).

155. McMahan-Howard et al., *supra* note 125, at 507.

156. Tamar Lewin, *Tougher Laws Mean More Cases Are Called Rape*, N.Y. TIMES (May 27, 1991), <https://www.nytimes.com/1991/05/27/us/tougher-laws-mean-more-cases-are-called-rape.html> [<https://perma.cc/D2E5-QFVF>].

157. See *infra* notes 158–163 and accompanying text.

158. McMahan-Howard et al., *supra* note 125, at 507; see also Spohn, *supra* note 124, at 122.

159. See Judith A. Lincoln, Note, *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape*, 35 WAYNE L. REV. 1219, 1233 (1989).

160. Brown, *supra* note 54, at 665.

degree,¹⁶¹ (3) permitting a marriage defense in cases of statutory rape,¹⁶² or (4) limiting the exemption.¹⁶³ Despite the various movements explained in Part II, married women were not liberated from sexual violence.¹⁶⁴ This is perhaps because rape reform had diminished focus on “‘nonparadigmatic’ victims.”¹⁶⁵

Lawmakers have continued to repeal portions of their states’ spousal exemptions without full repeal.¹⁶⁶ For example, in 1986, the Virginia legislature passed a partial repeal of spousal exemptions.¹⁶⁷ Then, in 2002, the legislature removed the force and non-cohabitating exemptions from its rape statute.¹⁶⁸ In 2005, the legislature removed the separate spousal section from the rape, sodomy, and object sexual penetration statutes and incorporated the majority of the statute to prohibit and punish spousal rape.¹⁶⁹ Yet, throughout these rounds of repeal, state statutes still separated spousal sexual violence from stranger sexual violence by permitting a lesser penalty or other variation.¹⁷⁰

Even though progress has been made, due to the loopholes and failed repeal efforts, married women are still at a disadvantage in their access to justice. Because of the historical backdrop and the justifications explained in Part I, spousal rape laws were difficult to fully repeal. However, with problematic consent issues at the forefront in the age of #MeToo, are legislatures and judicial benches making another change?

III. THE CURRENT STATE OF SPOUSAL SEXUAL VIOLENCE LAWS

As demonstrated in Part II, state statutes were not uniform in how they addressed spousal rape. Differing laws among states still exist today. Part III engages in a robust empirical study of current state laws pertaining to spousal sexual violence. It finds that full repeal remains an “elusive goal” and that married women

161. *Id.* at 669.

162. *Id.*

163. *Id.* at 670.

164. *See* Hasday, *supra* note 29, at 1482 (“[T]he legal status of marital rape was again subject to significant attack . . . Here too, however, the resulting reform has been partial and uneven.”).

165. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 595 (2009) (“[V]ictims of rapes without physical injuries, victims acquainted with defendants . . .”).

166. *See infra* Appendix.

167. Molly Moore & Tom Sherwood, *Strong Va. Spouse Rape Bill Advances*, WASH. POST (Feb. 10, 1986), <https://www.washingtonpost.com/archive/politics/1986/02/10/strong-va-spouse-rape-bill-advances/95bd03cb-3bce-4688-87ed-7a8e10a9806d/> [<https://perma.cc/KP9T-HJNH>].

168. 2002 Va. Acts 810 (removing “however, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused bodily injury to the spouse by the use of force or violence”).

169. 2005 Va. Acts 631 (removing “if any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse’s will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape” and revising “who is not his or her spouse” to “whether or not his or her spouse” or similar language from each statute).

170. VA. CODE ANN. § 18.2-61 (2021); *see also* 2001 Haw. Sess. Laws 941; 2016 Idaho Sess. Laws 828; 2011 La. Acts 67; 2011 Me. Laws 1113; 2009 Wyo. Sess. Laws 185.

are still fighting for “the right to control of their own bodies.”¹⁷¹ The following sections track spousal rape laws in the #MeToo era. Section III.A examines the loopholes that permit spousal sexual violence and displays how each adheres to the modern justifications outlined in Section I.C. Section III.B explores whether lawmakers have repealed any loopholes since the emergence of the #MeToo movement and if the movement has had any influence in new legislation.¹⁷²

A. States That Permit Spousal Sexual Violence

Various states refuse to move past eighteenth-century notions of marriage and instead uphold certain loopholes.¹⁷³ For example, in West Virginia, “sexual contact” is “any intentional touching . . . of the breasts, buttocks, anus or any part of the sex organs of another person . . . where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.”¹⁷⁴ Because of this existing spousal exemption, a person can commit any of the state’s sexual abuse statutes’ offenses against their spouse and not be liable for a criminal offense.¹⁷⁵ West Virginia’s sexual abuse statutes include sexual contact without consent “and the lack of consent results from forcible compulsion” or sexual contact with someone who is mentally impaired.¹⁷⁶ In other states, spousal sexual violence is protected by a myriad of loopholes. That is, some states essentially permit spousal sexual violence in certain circumstances including (1) allowing sexual activity when the perpetrator is in a supervisory position,¹⁷⁷ (2) creating exceptions to otherwise statutory rape,¹⁷⁸ or (3) finding consent where the spouse is mentally or physically impaired during sexual contact and therefore unable to consent.¹⁷⁹ Other states treat spousal sexual violence differently. Some states charge spousal

171. Brown, *supra* note 54, at 670.

172. For a fifty-state survey of spousal sexual violence laws, see *infra* Appendix.

173. The Supreme Court of Mississippi affirmed its belief in the marital defense as recently as 2015. *Burgess v. State*, 178 So. 3d 1266, 1273 (Miss. 2015). A state representative from Virginia has questioned, “How on earth you could validly get a conviction of a husband-wife rape when they’re living together, sleeping in the same bed, she’s in a nightie, and so forth, there’s no injury, there’s no separation or anything.” Lizzie Crocker, *Virginia Legislator Running for Congress Says Spousal Rape Should Be Legal*, DAILY BEAST (Apr. 14, 2017, 1:04 PM), <https://www.thedailybeast.com/virginia-legislator-running-for-congress-says-spousal-rape-should-be-legal> [<https://perma.cc/6BCS-K9KF>].

174. W. VA. CODE § 61-8B-1 (2021).

175. *Id.*

176. *Id.* §§ 61-8B-7 to -8.

177. See generally ARIZ. REV. STAT. ANN. § 13-1412 (2021); GA. CODE ANN. § 16-6-5.1 (2020); 720 ILL. COMP. STAT. 5/11-9.5 (2020); NEB. REV. STAT. § 28-322 (2021); S.D. CODIFIED LAWS § 22-22-29 (2021).

178. See *infra* Section III.A.1.

179. Sexual assault by compulsion fits within the impairment category but is a lesser offense. Found in statutes like Hawaii’s state code, a spouse may commit “sexual assault in the fourth-degree” by compulsion. HAW. REV. STAT. § 707-733 (2021). Compulsion is the “absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.” *Id.* § 707-700.

sexual violence under separate statutes and as a lesser crime¹⁸⁰ while other states bar a spousal defense.¹⁸¹

1. *Statutory Rape*

Some states permit sexual acts with minors as long as the perpetrator is their spouse.¹⁸² For example, in West Virginia, spousal sexual abuse is permitted against those twelve years old and younger if the perpetrator is fourteen years old or older.¹⁸³ These statutes are ambiguous about whether they apply only to consensual acts within a marriage or any sexual act within a marriage that includes a minor. Yet, accounting for the role that power plays in consent, are sexual acts between a minor and adult ever consensual?

2. *Physical or Mental Impairment*

In 2018, Michael S. Jones visited his wife while she lay in the hospital incapacitated.¹⁸⁴ As she was unable to consent, Jones decided at various moments that he could touch his wife's genitals.¹⁸⁵ Nurses reported these instances which resulted in Jones charged with first-degree sexual abuse against his wife.¹⁸⁶ A similar charge to that above is not possible in Idaho,¹⁸⁷ Iowa,¹⁸⁸ Kentucky,¹⁸⁹ Michigan,¹⁹⁰ Rhode Island,¹⁹¹ or Wyoming¹⁹² if the spouse is disabled due to mental conditions,

180. See CAL. PENAL CODE §§ 261–262 (West 2021).

181. Few states fall under this category. Some of these states also still create loopholes within specific statutes. See D.C. CODE § 22-3019 (2021); GA. CODE ANN. §§ 16-6-1 to -2 (2020); N.H. REV. STAT. ANN. § 632-A:5 (2021); N.C. GEN. STAT. § 14-27.34 (2021).

182. See ARIZ. REV. STAT. ANN. § 13-1407 (2021); ARK. CODE ANN. §§ 5-14-124 to -127 (2021); COLO. REV. STAT. §§ 18-3-402, -405.3 (2020); DEL. CODE ANN. tit. 11, § 770 (2021); HAW. REV. STAT. §§ 707-731 to -733 (2021); IOWA CODE § 709.4 (2020); KAN. STAT. ANN. §§ 21-5504 to -5505 (2021); LA. STAT. ANN. § 14:43.3 (2020); ME. STAT. tit. 17-A, §§ 253, 255-A, 260 (2021); MD. CODE ANN., CRIM. LAW § 3-318 (West 2021); 18 PA. CONS. STAT. § 3125 (2021); S.D. CODIFIED LAWS §§ 22-22-7, -7.4 (2021); W. VA. CODE §§ 61-8B-1, -7 (2021).

183. W. VA. CODE §§ 61-8B-1, -7 (2021).

184. Pat Pratt, *Man Charged with Abusing Wife in Hospital*, COLUM. DAILY TRIB. (June 11, 2018, 12:28 PM), <https://www.columbiatribune.com/news/20180611/man-charged-with-abusing-wife-in-hospital> [https://perma.cc/M4L6-QFBX].

185. *Id.*

186. *Id.*

187. IDAHO CODE §§ 18-6101, -6107 (2021).

188. IOWA CODE § 709.4 (2020).

189. KY. REV. STAT. ANN. § 510.035 (West 2021).

190. MICH. COMP. LAWS § 750.520a (2021).

191. R.I. GEN. LAWS §§ 11-37-1 to -2 (2020).

192. WYO. STAT. ANN. § 6-2-307 (2020).

or in Connecticut,¹⁹³ Maryland,¹⁹⁴ Mississippi,¹⁹⁵ Ohio,¹⁹⁶ Oklahoma,¹⁹⁷ or West Virginia¹⁹⁸ if the spouse is impaired.

a. Disability

A person can subject their spouse with a disability that limits their ability to consent to sexual violence without legal consequences.¹⁹⁹ These, and the other loopholes mentioned in this Section, are not cases of poor drafting but purposeful targeting of spousal relationships. The same rules do not apply to single women.²⁰⁰ For example, consider Amanda, who lives with a “borderline IQ.”²⁰¹ A borderline IQ qualifies under the Iowa sexual abuse statute as a mental defect.²⁰² During a visit from Carl Skaggs, Amanda’s former caseworker’s husband, Skaggs “inserted his penis into” Amanda while she lay next to him.²⁰³ A doctor asked Amanda if she had told Skaggs “no,” which Amanda did not, thus presenting complicated consent issues.²⁰⁴ The court found that due to Amanda’s “limited intellectual abilities,” she was unable to consent to the encounter.²⁰⁵ Under Iowa law, the court could not have contemplated the consent issues if Amanda and Skaggs were married. Under these statutes, married women are not allowed to explain whether they told their rapist “yes” or “no.”²⁰⁶ They are not even able to explain whether they had the ability to say no. When involving spouses who are cohabitating, the statute assumes implicit consent.²⁰⁷

b. Impairment

Various states effectively allow spousal sexual violence when one spouse is under some type of mental or physical impairment.²⁰⁸ Ohio’s rape statute allows for

193. CONN. GEN. STAT. §§ 53a-67, -70b (2021).

194. MD. CODE ANN., CRIM. LAW §§ 3-304, -307, -318 (West 2021).

195. MISS. CODE ANN. §§ 97-3-95, -99 (West 2021).

196. OHIO REV. CODE ANN. § 2907.02 (West 2021).

197. OKLA. STAT. ANN. tit. 21, § 1111 (2021).

198. W. VA. CODE §§ 61-8B-1, -8 (2021).

199. See IOWA CODE § 709.4 (2020). Spousal rape occurs more often in Iowa than any other state. In Iowa, one in six people report intimate partner rape. Kathy A. Bolten, *1 in 6 Iowa Women Say an Intimate Partner Has Raped Them, Survey Says*, DES MOINES REG. (Jan. 25, 2019, 3:39 PM), <https://www.desmoinesregister.com/story/news/investigations/2019/01/24/domestic-violence-iowa-courts-me-too-spousal-sexual-abuse-marital-rape-sex-intimate-partner-assault/2607523002/> [https://perma.cc/QZE3-ACNA].

200. See *State v. Skaggs*, No. 00-1904, 2002 WL 31015241 (Iowa Ct. App. Sept. 11, 2002).

201. *Id.* at *1.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See IOWA CODE § 709.4 (2020).

207. See *id.*

208. See IDAHO CODE § 18-6101 (2021); OHIO REV. CODE ANN. § 2907.02 (West 2021); MICH. COMP. LAWS § 750.520l (2021); MISS. CODE ANN. § 97-3-95 (West 2021); OKLA. STAT. ANN. tit. 21, § 1111 (West 2021).

an egregious spousal exemption to remain.²⁰⁹ Under the Ohio statute, rape of a married and cohabitating spouse is only considered criminal if compelled by force or the threat of force.²¹⁰ Ohio's law, therefore, would permit spousal rape if the victim is drugged—even by the offending spouse—or in another state of impairment caused by a mental or physical condition.²¹¹ Lawmakers have attempted to remove this loophole; however, each bill has faced opposition.²¹²

Ohio courts have not had to rule on appeal regarding this statute, but they frequently address the issue regarding single women.²¹³ In these cases, the court presents their conscious awareness of the spousal exemption and distinguishes whether the victim was single or married to their perpetrator.²¹⁴ For example, during a night out, E.C. drank “too much,” so her friends called an Uber.²¹⁵ E.C. woke up “bent over her bed” as her Uber driver “anally penetrat[ed] her.”²¹⁶ The defendant claimed that E.C. asked him to come into her house, and he believed the invitation implied consent.²¹⁷ The court was not convinced and explained that E.C. could not give consent because of her substantial impairment.²¹⁸ In four different parts of the opinion, the court mentioned that the parties were not married, which would have changed its analysis.²¹⁹ Similarly, in *Ohio v. Allen*, the court explained that one of the pertinent facts to be proven during trial was that the appellant and victim were not

209. OHIO REV. CODE ANN. § 2907.02 (West 2021).

210. A court in Ohio challenged the defense of spousal rape when force is used, but the state has not applied similar reasoning to other loopholes. *State v. Rittenhour*, 678 N.E.2d 293, 295 (Ohio Ct. App. 1996) (“[A] marriage license would give a spouse free rein to assault and sexually abuse their mate to any degree without fear of prosecution because of some impenetrable shield of marital sexual privacy. Meanwhile, the victim spouse would be stripped of his or her right to personal safety and bodily integrity.”).

211. OHIO REV. CODE ANN. § 2907.02 (West 2021).

212. There have been attempts in 2015, 2017, and ongoing since 2019. Eric Sandy, *In the Fight to Outlaw Marital Rape Exemptions, Ohio Republicans Go Silent*, CLEV. SCENE (Feb. 28, 2017, 12:25 PM), <https://www.clevscene.com/scene-and-heard/archives/2017/02/28/in-the-fight-to-outlaw-marital-rape-exemptions-ohio-republicans-go-silent> [https://perma.cc/5TWQ-RP98]; S. 162, 133d Gen. Assemb., Reg. Sess. (Ohio 2019).

213. See *State v. Miller*, No. 8-19-02, 2019 WL 4927115 (Ohio Ct. App. Oct. 7, 2019); *State v. Biven*, No. 2018 CA 0082, 2019 WL 2613295 (Ohio Ct. App. June 24, 2019), *appeal denied*, 132 N.E.3d 709 (Ohio 2019); *State v. Dailey*, No. 18CA1059, 2018 WL 5314869 (Ohio Ct. App. Oct. 10, 2018). Courts also address this issue under the statutory rape context. *Haley v. Commonwealth*, No. 0877-06-2, 2007 WL 3252824 (Va. Ct. App. Nov. 6, 2007) (evaluating state child marriage laws to determine whether defendant could prove that portion of the statute).

214. See *State v. Franklin*, No. 29071, 2019 WL 1813045, at *1 (Ohio Ct. App. Apr. 24, 2019) (making the distinction between married and unmarried women under the Ohio rape statutes).

215. *Id.*

216. *Id.*

217. *Id.* at *1, *6.

218. *Id.* at *3–4.

219. *Id.* at *2–4, *8.

married.²²⁰ Both cases implied that the marital status of the parties may have caused a different result.

3. *Different Treatment*

Reporting barriers are also present within state statutes. South Carolina places a strict statute of limitations on prosecuting sexual violence between spouses: an abused spouse must report a case within thirty days of the incident.²²¹ After thirty days, the spouse's access to justice is null. Spousal rape is also punished to a lesser extent than the rape of the unmarried. For example, courts in Virginia can place any person who is convicted of sexual assault against their spouse and is a first-time offender on a conditional probation.²²² The spouse must then attend a specified number of court-appointed therapy meetings.²²³ The complaining spouse and the Commonwealth must consent to the conditional probation.²²⁴ Once the spouse completes the court-appointed therapy, the court may dismiss the charges if it finds dismissal "will promote maintenance of the family."²²⁵

The spousal exemptions that remain in state statutes reinforce both the modern and historical justifications for spousal exemptions. The existence of statutes that permit sexual violence through supervisory privilege, age, and impairment supports the theory that states still adhere to implied and irrevocable consent. For example, Virginia's lesser punishments for spousal rape support an insistence on marital reconciliation.²²⁶ Similarly, statutes that require a certain type of force to constitute sexual violence support the notion that spousal rape cases are difficult to prove. Moreover, a narrow statute of limitations relates to the theory that women are vindictive actors, only reporting when it is beneficial. These theories are also present in current repeal efforts, with various members of the Kansas Legislature citing them in their opposition.²²⁷

220. State v. Allen, No. OT-18-001, 2018 WL 4524000, at *1 (Ohio Ct. App. Sept. 21, 2018) (finding perpetrator and victim drank together, then the perpetrator "digitally penetrated" her, taped it, and released the video on social media).

221. S.C. CODE ANN. §§ 16-3-615, -658 (2021).

222. VA. CODE ANN. § 18.2-61 (2021); *see also id.* § 19.2-218.1.

223. *Id.* § 19.2-218.1.

224. Wilson v. Commonwealth, 711 S.E.2d 251 (Va. Ct. App. 2011) (explaining when a husband cannot receive therapy).

225. VA. CODE ANN. § 19.2-218.1 (2021). The only case to reach the Virginia appellate court regarding court-appointed therapy for spousal rape is *Wilson v. Commonwealth*. In *Wilson*, the defendant's wife refused to have sex with him. He "stuck his finger in her anus," and threatened to kill her. He then forced her to perform oral sex. Ultimately, the court did not give its required consent to therapy and Wilson did not receive the lesser penalty. Brief for the Commonwealth at 3-4, *Wilson*, 711 S.E.2d 251 (No. 0728-10-1).

226. VA. CODE ANN. § 18.2-61 (2021); *see also id.* § 19.2-218.1.

227. *See infra* notes 274-276.

B. Repeal in the Wake of Increased Awareness About Sexual Violence

While some states are reluctant to repeal spousal exemptions, there is evidence that public opinion is impacting legislation. The states mentioned below have devoted attention to remedying their legislatures' failed attempts to repeal spousal exemptions from the 1980s and 1990s. Section III.B chronicles the repeal of spousal exemptions in Alabama, Alaska, Connecticut, Minnesota, and New Hampshire and the attempted repeals in Idaho, Kansas, Maryland, Michigan, and Ohio. Section III.B also presents the #MeToo movement's influence on the previously mentioned state attempts to repeal spousal exemptions.

1. Enacted Legislation

In Alabama, before 2019, if the perpetrator and victim were married, the perpetrator could not violate the state's sexual contact and deviate sexual intercourse statutes by assaulting their spouse.²²⁸ During the 2019 legislative cycle, sponsors State Representative Christopher England and State Senator Vivian Figures successfully proposed legislation to remove the "not married to each other" language from the Alabama statutes.²²⁹ The removal of the spousal exemption clause now allows for the conviction of spouses for sexual misconduct, sexual abuse in the first degree, and sexual abuse in the second degree.²³⁰ The Alabama Coalition Against Rape was highly influential in helping the spousal exemption's repeal.²³¹

Similarly, Justin Schneider's case highlighted Alaska's sexual assault crises.²³² Schneider grabbed a woman, strangled her, and then masturbated on her

228. ALA. CODE § 13A-6-60(2) (2018) (defining deviate sexual intercourse as "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another"); *id.* § 13A-6-60(3) (sexual contact); *id.* §§ 13A-6-65 to -67. Even though an Alabama court held that the spousal rape privilege was unconstitutional, the legislature worked around this ruling by allowing a spousal exemption in the state's other sexual assault statutes. *Merton v. State*, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986) ("[W]e now hold that the marital exemption for rape also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.").

229. ALA. CODE §§ 13A-5-6, -6-60 to -65, -6-65.1, -6-66 to -68, -6-70 to -71, -6-81 to -82, -6-122, -6-241, -6-243, -11-9, -11-32.1, -12-120 to -121, -12-190, -12-192, 15-3-5, -20A-5, -20A-44, 23-101 to -102 (2018), *amended by* S. 320, 2019 Leg., Reg. Sess. (Al. 2019).

230. ALA. CODE §§ 13A-6-60, -65 to -67 (2021).

231. Hillary Simon, *Sex Offenses Bill Would Change Language in What's Considered Rape in Alabama*, CBS (May 1, 2019, 3:44 AM), <https://www.cbs42.com/news/sex-offenses-bill-would-change-language-in-whats-considered-rape-in-alabama/> [<https://perma.cc/N4AF-AWBW>].

232. See James Brooks, *Alaska Governor Vows to Fix 'Loophole' in Sex Crime Laws*, JUNEAU EMPIRE (Sept. 22, 2018, 3:13 PM) [hereinafter Brooks, *Alaska Governor Vows to Fix 'Loophole' in Sex Crime Laws*], <https://www.juneauempire.com/news/alaska-governor-vows-to-fix-loophole-in-sex-crime-laws/> [<http://web.archive.org/web/20210402080258/https://www.juneauempire.com/news/alaska-governor-vows-to-fix-loophole-in-sex-crime-laws/>]; Kevin Baird, *Pre-Filed Bills Tackle Alaska's Sexual Assault Problem*, PENINSULA CLARION (Jan. 12, 2019, 4:12 PM), <https://www.peninsulaclarion.com/news/pre-filed-bills-tackle-alaskas-sexual-assault-problem/> [<http://web.archive.org/web/20210402080401/https://www.peninsulaclarion.com/news/pre-filed-bills-tackle-alaskas-sexual-assault-problem/>]; James Brooks, *To Fight Crime, Democratic Lawmakers Seek to Close Loopholes in State Law*, ANCHORAGE DAILY NEWS (Jan. 12, 2019) [hereinafter Brooks,

unconscious body.²³³ He did not serve any jail time because his actions did not fit within Alaska's definition of sexual assault.²³⁴ The Schneider case influenced Alaskan lawmakers to overhaul the state's sexual violence statutes,²³⁵ resulting in a repeal of the state's spousal rape defense.²³⁶ Two signature bills attempted to repeal the previous statute, the first being Alaska House Bill 33.²³⁷ Sponsored by State Representative Matt Claman, the bill removed a defense that allowed "a perpetrator of sexual assault to use marriage as a defense if the person engages in sexual activity with their spouse when they know their spouse is mentally incapable, incapacitated, or unaware that the sexual act is being committed."²³⁸ However, the standalone Alaska House Bill 33 did not pass; its proposal left the committee dissatisfied with the House's comprehensive crime bill, Alaska House Bill 49.

Initially, under Alaska House Bill 49 (touted to improve Alaska's laws and make the state's communities safer), the spousal rape exemption would remain.²³⁹ However, after the introduction of Alaska House Bill 33, amendments to Alaska House Bill 49 were introduced to address spousal assault in several ways: (1) adding the spousal defense to sexual assault in the fourth degree;²⁴⁰ (2) repealing portions

To Fight Crime, Democratic Lawmakers Seek to Close Loopholes in State Law], <https://www.adn.com/politics/alaska-legislature/2019/01/12/to-fight-crime-democratic-lawmakers-seek-to-close-loopholes-in-state-law/> [https://perma.cc/24RH-TTGA].

233. Baird, *supra* note 232.

234. *Id.*

235. See Brooks, *Alaska Governor Vows to Fix 'Loophole' in Sex Crime Laws*, *supra* note 232; Brooks, *To Fight Crime, Democratic Lawmakers Seek to Close Loopholes in State Law*, *supra* note 232.

236. ALASKA STAT. § 11.41.432 (2020).

237. H.R. 33, 31st Leg., 1st Sess. (Alaska 2019).

238. Press Release, Matt Claman, Rep., Alaska State Legislature, House Bill 33 Sponsor Statement (2019), http://www.akleg.gov/basis/get_documents.asp?session=31&docid=34933 [http://web.archive.org/web/20201024030239/http://www.akleg.gov/basis/get_documents.asp?session=31&docid=34933].

239. An Act Relating to Criminal Law and Procedure; Relating to Controlled Substances; Relating to Probation; Relating to Sentencing; Relating to Reports of Involuntary Commitment; Amending Rule 6, Alaska Rules of Criminal Procedure; and Providing for an Effective Date, H.R. 49, 31st Leg., 1st Sess. (Alaska 2019) (as amended on Feb. 20, 2019).

240. An Act Relating to Criminal Law and Procedure; Establishing the Crime of Possession of Motor Vehicle Theft Tools; Relating to Electronic Monitoring; Relating to Controlled Substances; Relating to Probation; Relating to Sentencing; Relating to Registration of Sex Offenders; Relating to Operating under the Influence; Relating to Refusal to Submit to a Chemical Test' Relating to the Duties of the Commissioner of Corrections; Relating to the Alaska Criminal Justice Commission; Relating to the Duties of the Attorney General and the Department of Law; Relating to Testing of Sexual Assault Examination Kits; Relating to Public Disclosure of Information Relating to Certain Minors; Amending Rule 6(R)(6), Alaska Rules of Criminal Procedure; and Providing For an Effective Date, H.R. 49, 31st Leg., 1st Sess. (Alaska 2019) (as amended on Apr. 30, 2019).

of the spousal defense, allowing its use for perpetrators in a supervisory role and sexual assault in the fourth degree;²⁴¹ and (3) repealing the spousal defense.²⁴²

After the various amendments stated above, the house voted down the spousal exemption repeal before sending the bill to the state senate.²⁴³ State Representative Sara Rasmussen condemned the House for voting the repeal amendment down stating, “[O]ur state consistently ranks among the highest sexual abuse rates nationally, and many of those cases *are* domestic violence cases between spouses. I am at a loss as to why some members of the Majority continue to downplay this issue and skirt the need to solve this problem.”²⁴⁴ Representative Rasmussen also told a familiar story during a press conference after the house voted the amendment down.²⁴⁵ In the story Representative Rasmussen recounted, an Alaskan woman’s husband sexually assaulted her after her medication left her unconscious.²⁴⁶ Due to the spousal defense, the husband was not charged.²⁴⁷ Once the bill reached the state senate, senators supported the complete repeal of the spousal defense

241. An Act Relating to Criminal Law and Procedure; Eliminating Marriage as a Defense to Certain Crimes of Sexual Assault; Establishing the Crime of Possession of Motor Vehicle Theft Tools; Relating to Electronic Monitoring; Relating to Controlled Substances; Relating to Probation and Parole; Relating to Sentencing; Amending the Definitions of ‘Most Serious Felony,’ ‘Sex Offense,’ and ‘Sex Offender’; Relating to Registration of Sex Offenders; Relating to Operating under the Influence; Relating to Refusal to Submit to a Chemical Test; Relating to the Duties of the Commissioner of Corrections; Relating to Testing of Sexual Assault Examination Kits; Relating to Reports of Involuntary Commitment; Amending Rules 6(R)(6) and 38.2, Alaska Rules of Criminal Procedure; and Providing for an Effective Date, H.R. 49, 31st Leg., 1st Sess. (Alaska 2019) (as amended on May 7, 2019).

242. An Act Relating to Criminal Law and Procedure; Relating to Pretrial Services; Establishing the Crime of Possession of Motor Vehicle Theft Tools; Relating to Electronic Monitoring; Relating to Controlled Substances; Relating to Probation and Parole; Relating to Sentencing; Amending the Definitions of ‘Most Serious Felony,’ ‘Sex Offense,’ and ‘Sex Offender’; Relating to Registration of Sex Offenders; Relating to Operating under the Influence; Relating to Refusal to Submit to a Chemical Test; Relating to the Duties of the Commissioner of Corrections; Relating to Testing of Sexual Assault Examination Kits; Relating to Reports of Involuntary Commitment; Amending Rules 6(R)(6) And 38.2, Alaska Rules of Criminal Procedure; and Providing for an Effective Date, H.R. 49, 31st Leg., 1st Sess. (Alaska 2019) (as amended on May 8, 2019).

243. The co-sponsor of the amendment, Representative Sara Rasmussen, released a statement condemning the removal of the repeal, stating, “I will not support any crime bill that condones rape or sexual abuse. Not now, and not ever.” Press Release, The Alaska House Republicans, Rasmussen Urges Senate to Add Marital Defense Amendment (May 10, 2019), <https://static1.squarespace.com/static/5c3e33623917ee27c879a396/t/5cd60382419202a56d0dd29f/1557529475124/Press+Statement+-+Rasmussen+on+HB+49.pdf> [<https://perma.cc/PPT6-XESQ>].

244. *Id.*

245. Alex McCarthy, *Lawmakers Ask Why Alaska Still Has ‘Marriage Defense’ Against Spousal Rape*, HOMER NEWS (May 15, 2019, 4:12 PM), <https://www.homernews.com/news/lawmakers-ask-why-alaska-still-has-marriage-defense-against-spousal-rape/> [<http://web.archive.org/web/20210402080657/https://www.homernews.com/news/lawmakers-ask-why-alaska-still-has-marriage-defense-against-spousal-rape/>].

246. *Id.*

247. *Id.*

amendment,²⁴⁸ and after a special session, the Governor signed Alaska House Bill 49 into law.²⁴⁹

Likewise, Connecticut partially repealed the state's spousal exemptions in 2019. Before the limited repeal, any rape statute that contained the words "sexual intercourse" or "sexual contact" contained a spousal exemption.²⁵⁰ Additionally, the spousal rape statute required physical force or force through the use of a "dangerous instrument."²⁵¹ Connecticut House Bill 7396 removed the spousal exemption from the statute's definitions and repealed the specific spousal rape statute.²⁵² However, a spousal exemption remains. The state continues to allow marriage as an affirmative defense to portions of the rape statute.²⁵³ Further, the exemptions that remain cover all cohabitating relationships, not only couples who are legally married.²⁵⁴

Before Minnesota repealed its voluntary relationship defense, one could legally sexually assault one's spouse so long as the spouse was mentally or physically incapacitated.²⁵⁵ Jenny Teeson, who herself is a survivor of spousal rape, spearheaded the movement to repeal Minnesota's archaic law.²⁵⁶ In Teeson's case, her husband recorded their consensual intimate moments as well as his abuse.²⁵⁷ The videos included a recording where he "forcibly penetrat[ed] her with an

248. James Brooks, *Alaska House Rejects Senate Changes to Crime Bill, Making Special Session Likely*, ANCHORAGE DAILY NEWS (May 14, 2019), <https://www.adn.com/politics/alaska-legislature/2019/05/14/alaska-house-rejects-senate-changes-to-crime-bill-making-special-session-likely/> [<https://perma.cc/DCW5-YE8Y>].

249. Press Release, Office of Governor Mike Dunleavy, Governor Dunleavy Signs Crime-Fighting Legislation into Law (July 8, 2019), <https://gov.alaska.gov/newsroom/2019/07/08/governor-dunleavy-signs-crime-fighting-legislation-into-law/> [<https://perma.cc/8PXD-EZDA>] ("Repeals marriage as a defense to sexual assault except in cases where there is consent and the conduct is illegal due to the nature of the relationship but-for the marriage (probation officer/probationer, peace officer/person in custody, DJJ officer/person 18 or 19 an [sic] under the jurisdiction of the Division of Juvenile Justice).").

250. CONN. GEN. STAT. § 53a-65 (2018) (defining "sexual intercourse" as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex, and its meaning is limited to persons not married to each other" and "sexual contact" as "any contact with the intimate parts of a person not married to the actor").

251. *Id.* § 53a-70b ("No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.").

252. H.R. 7396, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

253. CONN. GEN. STAT. § 53a-67 (2021).

254. *Id.*

255. MINN. STAT. § 609.349 (2021).

256. Aris Folley, *Minnesota Governor Signs Law Making Marital Rape Illegal*, HILL (May 3, 2019, 7:37 AM), <https://thehill.com/homenews/state-watch/441936-minnesota-makes-marital-rape-illegal> [<https://perma.cc/NHJ4-EF28>] ("Courageous Minnesotans like Jenny Teeson who are coming forward to tell painful personal stories are the inspiration behind this legislation . . ."); Briana Bierschbach, *This Woman Fought to End Minnesota's 'Marital Rape' Exception, and Won*, NPR (May 4, 2019, 7:52 AM), <https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won> [<https://perma.cc/8JCM-DZ72>].

257. Bierschbach, *supra* note 256.

object”²⁵⁸ as she lay unconscious next to their four-year-old son.²⁵⁹ Teeson believes her husband drugged her to commit the violation²⁶⁰ and soon after reported her husband’s abuse.²⁶¹ Then, she found out that the actions that her husband took were not technically sexual assault within the statutory definition under Minnesota law.²⁶² After Teeson became aware of Minnesota’s spousal defense, she spoke with the Minnesota Legislature.²⁶³ Minnesota lawmakers were unaware of the exemption and passed a unanimous bill repealing the exemption shortly after Teeson brought it to their attention.²⁶⁴

In 2020, the New Hampshire legislature repealed most of the state’s spousal exemptions through New Hampshire House Bill 705.²⁶⁵ Previously, the state’s statute contained loopholes regarding sexual assault against spouses with disabilities that made them “incapable of freely arriving at an independent choice as to whether or not to engage in sexual conduct.”²⁶⁶ Additionally, New Hampshire House Bill 705 removed exemptions regarding spousal sexual violence against minors.²⁶⁷

2. Proposed Legislation

Currently, under Idaho law, there are six spousal exemptions in the state’s spousal rape statute.²⁶⁸ In 2021, Idaho State Senator Wintrow introduced Idaho Senate Bill 1089 which fully repeals the Idaho statute permitting spousal exemptions.²⁶⁹ The bill unanimously passed the Idaho state senate and has crossed over to the house to be read in that chamber.²⁷⁰

Additionally, Kansas sexual battery law contains “who is not the spouse” language, exempting spouses from the definition of a victim of sexual battery.²⁷¹ In an effort to repeal the current statute, State Representative Brett Parker introduced Kansas House Bill 2079²⁷² after “hearing concerns from a representative of the

258. Karen Zraick, *Inside One Woman’s Fight to Rewrite the Law on Marital Rape*, N.Y. TIMES (Apr. 13, 2019), <https://www.nytimes.com/2019/04/13/us/marital-rape-law-minnesota.html> [<https://perma.cc/2KEA-FWJL>].

259. *Id.*

260. *Id.*

261. *See id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. An Act Relative to Sexual Assault, Sexual Misconduct in Institutions of Higher Education, and the Rights of Victims of Crime, H.R. 705-FN, 2020 Leg., Reg. Sess. (N.H. 2020).

266. N.H. REV. STAT. ANN. § 632-A:2(I)(h) (2021) (aggravated felonious sexual assault).

267. *Compare* N.H. H.R. 750-FN, *with* N.H. REV. STAT. ANN. §§ 632-A:2(I)(k), -A:4(I)(b) (2020) (sexual assault).

268. IDAHO CODE § 18-6107 (2021).

269. S. 1089, 66th Leg., 1st Reg. Sess. (Idaho 2021).

270. *See Senate Bill 1089*, IDAHO LEGISLATURE, <https://legislature.idaho.gov/sessioninfo/2021/legislation/S1089/> [<https://perma.cc/PY29-7ZZD>] (last visited Mar. 26, 2021).

271. KAN. STAT. ANN. § 21-5505 (2021).

272. Removing the Spousal Exception from Sexual Battery, H.R. 2079, 2019 Leg., Reg. Sess. (Kan. 2019).

Metropolitan Organization to Counter Sexual Assault.”²⁷³ No one directly opposed the bill, but state representatives voiced several concerns that mirror the justifications discussed in Part I.²⁷⁴ State Representative Emil Berquist voiced concern about “a spouse who regretted experimentation with ‘abnormal and abhorrent’ sexual acts” who might then accuse their spouse of rape.²⁷⁵ State Representative Kellie Warren worried about prosecuting spouses who were “in the mood for sex while the partner wasn’t on the same page.”²⁷⁶ Additionally, State Representative Mark Samsel wondered if spouses would use this statute as a way to punish the other in a future unrelated marital controversy.²⁷⁷ There was no documented opposition to the bill, but it did not move forward during the 2019 legislative term because it was “deemed not important enough.”²⁷⁸ In 2020, lawmakers again tried to bring this issue to the forefront. Representative Fred Patton proposed a bill similar to Kansas House Bill 2079, Kansas House Bill 2467, which does not have any documented opposition.²⁷⁹ Kansas House Bill 2467 did not advance from the Kansas Senate Judiciary Committee.²⁸⁰

In 2019, the Maryland House of Delegates proposed to eliminate the spousal defense for sexual offenses.²⁸¹ The bill did not leave the Maryland House Judiciary Committee. This, in part, was due to the opposition wondering whether “‘smacking the other’s behind’ during an argument” would be considered sexual assault.²⁸² Another lawmaker asked, “If your religion believes if you’re married, two are as one

273. Hailey Dixon, *‘Unconscionable’: Spouses Vulnerable to Sexual Abuse Under Kansas Law*, OTTAWA HERALD (May 12, 2019, 9:53 PM), <http://www.ottawaherald.com/news/20190512/unconscionable-spouses-vulnerable-to-sexual-abuse-under-kansas-law> [https://perma.cc/95AY-YLQM].

274. Tim Carpenter, *House Bill Strikes Kansas’ Spousal Exemption to Sexual Battery*, TOPEKA CAP.-J. (Feb. 10, 2019, 8:33 PM), <https://www.cjonline.com/news/20190209/house-bill-strikes-kansas-spousal-exemption-to-sexual-battery> [https://perma.cc/SC59-PL9N].

275. *Id.* Berquist’s commentary is an example of evidentiary issues.

276. *Id.* Warren’s commentary is an example of implicit consent.

277. *Id.* Samsel’s commentary is an example of evidentiary issues.

278. The Ed. Bd., *Why Won’t the Kansas Legislature Outlaw Spousal Sexual Battery and Sexual Extortion?*, KAN. CITY STAR (Mar. 4, 2019, 9:33 PM), <https://www.kansascity.com/opinion/editorials/article226939444.html> [https://web.archive.org/web/20201130003204/https://www.kansascity.com/opinion/editorials/article226939444.html] (explaining that it also may have not passed because the Republican led state houses refuse to pass any legislation proposed by a Democrat).

279. Tim Carpenter, *House Panel Advances Bill Ending Spousal Exemption to Sexual Battery*, MCPHERSON SENTINEL (Jan. 27, 2020, 6:04 PM), <https://www.mcphersonsentinel.com/news/20200127/house-panel-advances-bill-ending-spousal-exemption-to-sexual-battery> [https://perma.cc/7BZ8-X37B].

280. *See HB 2467*, KAN. 2019-2020 LEGIS. SESSIONS, http://www.kslegislature.org/li_2020/b2019_20/measures/hb2467/ [https://perma.cc/7EPH-TNTM] (last visited Mar. 25, 2021).

281. An Act Concerning Criminal Law – Sexual Crimes – Repeal of Spousal Defense, H.D. 958, 440th Gen. Assemb., Reg. Sess. (Md. 2019).

282. Julie Carr Smyth & Steve Karnowski, *Midwestern States Seek to Close Loopholes in Marital Rape Laws*, CHI. TRIB. (May 4, 2019, 11:53 AM), <https://www.chicagotribune.com/nation-world/ct-marital-rape-laws-20190504-story.html> [https://web.archive.org/web/20201027102455/https://www.chicagotribune.com/nation-world/ct-marital-rape-laws-20190504-story.html].

body . . . [.] Can you get a religious exemption?”²⁸³ In 2020, Maryland lawmakers again proposed a bill, Maryland House Bill 590, to eliminate the state’s spousal defense.²⁸⁴ Advocates explained the need for the bill, citing a familiar circumstance where a husband repeatedly raped his wife while she was unconscious.²⁸⁵ However, lawmakers had misgivings. Opposition came from State Senator Robert Cassilly, who questioned the necessity of repealing the spousal exemption given the availability of other legal protections for spouses, stating, “If you don’t want to be touched, put him out of the house with a protective order.”²⁸⁶ In 2021, lawmakers have continued to evaluate legislation to repeal the state’s spousal exemptions.²⁸⁷

Lawmakers in Michigan proposed a change to their spousal rape statutes in late 2019.²⁸⁸ Currently, a spouse is not liable for spousal sexual violence “solely because” their spouse is “mentally incapable, or mentally incapacitated” during sexual acts.²⁸⁹ The law then permits spouses to sexually abuse their partners while they are unable to consent. Michigan House Bill 4942 proposes to eliminate the mental incapacitation loophole.²⁹⁰ The inspiration for the repeal began when a constituent messaged State Representative Pohutsky about the loophole on Twitter.²⁹¹ A survivor of intimate partner rape herself, State Representative Pohutsky was very troubled when learning that Michigan law allowed for this type of abuse.²⁹² She plans to eliminate the mentally incapable language at a later date

283. *Id.*

284. An Act Concerning Criminal Law – Sexual Crimes – Repeal of Spousal Defense (Love Is No Defense to Sexual Crimes), H.D. 590, 441st Gen. Assemb., Reg. Sess. (Md. 2020).

285. The wife found out about the rapes because videos of the encounters were posted online. Kate Ryan, *Lawmakers Look to Close Loopholes in Maryland’s Marital Rape Laws*, WTOP NEWS (Feb. 13, 2020, 6:44 PM), <https://wtop.com/maryland/2020/02/lawmakers-look-to-close-loopholes-in-marylands-marital-rape-laws/> [<https://perma.cc/67Q9-WYA3>].

286. *Id.*

287. S. 250, 442d Gen. Assemb., Reg. Sess. (Md. 2021).

288. Chenya Roth, *State Lawmaker Seeking to Remove Exception in Michigan’s Marital Rape Laws*, MICH. RADIO (Sept. 16, 2019), <https://www.michiganradio.org/post/state-lawmaker-seeking-remove-exception-michigans-marital-rape-laws> [<https://perma.cc/J6JD-7PF9>].

289. MICH. COMP. LAWS § 750.520l (2021); *see also id.* § 750.520a(j)–(k) (“‘Mentally incapable’ means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct. ‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.”).

290. H.R. 4942, 100th Leg., Reg. Sess. (Mich. 2019); *Pohutsky Fights to Close Marital Rape Loophole*, MICH. HOUSE DEMOCRATS (Sept. 10, 2019), <https://housedems.com/pohutsky-fights-to-close-marital-rape-loophole/> [<https://perma.cc/7DEW-4FWV>] (“A law like this only empowers those who view their spouses as property, preventing justice for Michiganders who have already experienced unspeakable trauma. It’s time for us as a state to make it unequivocally clear that rape is rape in all circumstances.”).

291. Kim Russell, *This Loophole Could Let a Husband Get Away with Sexually Assaulting His Wife in Michigan*, WXYZ DET. (Oct. 24, 2019, 7:16 PM), <https://www.wxyz.com/news/this-loophole-could-let-a-husband-get-away-with-sexually-assaulting-his-wife-in-michigan> [<https://perma.cc/C9D5-NM9B>].

292. *Id.*

because she believes that the statutory definition of mentally “incapable” and implications of a repeal are less clear.²⁹³ State Representative Pohutsky has found bipartisan support and believes that this repeal is a crucial step forward toward justice for survivors of sexual assault.²⁹⁴ The Michigan Legislature has not moved forward with the bill.²⁹⁵

Similarly, Ohio lawmakers again tried to repeal the state’s spousal rape loophole.²⁹⁶ Ohio’s governor and the current and former attorneys general pushed for an elimination of the statute of limitations in the state’s rape statutes.²⁹⁷ Lawmakers attached a spousal rape repeal to the legislation.²⁹⁸ The Ohio Prosecuting Attorneys Association, a previously influential opponent to the repeal, even stated that repeal was feasible.²⁹⁹ However, the bills did not advance through the Ohio Senate Judiciary Committee or the Ohio House Criminal Justice Committee.³⁰⁰

3. Related Legislation

There are other contentious legislative issues involving spousal rape that are not captured in rape statutes. Arizona State Senator Eddie Farnsworth has fought to allow a spousal rape exemption to a bill that would “terminate the parental rights” of rapists.³⁰¹ In 2020, he stated, “I don’t think someone who’s been married, and has children, should be able to cry rape.”³⁰² He has held this view for a while. In

293. Shelby Tankersley, *Michigan Lawmaker Wants to Close Loophole Allowing Marital Rape*, HOMETOWN LIFE (Sept. 30, 2019, 10:39 AM), <https://www.hometownlife.com/story/news/local/livonia/2019/09/26/rep-laurie-pohutsky-hoping-close-loophole-marital-rape-law/2340882001/> [<https://perma.cc/8RYF-VL4T>] (“We and the ACLU have concerns about consenting adults who could possibly be on the autism spectrum or something like that getting caught up because of this, frankly, very loose, very cloudy definition of being mentally incapable.”).

294. *Id.*

295. See *House Bill 4942 (2019)*, MICH. LEGISLATURE, <http://legislature.mi.gov/doc.aspx?2019-HB-4942> [<https://perma.cc/B7PZ-CDBT>] (last visited Mar. 25, 2021).

296. Laura Hancock, *Ohio Bills Would Lift Marital Exemptions, Statute of Limitations on Rape*, CLEVELAND.COM (June 7, 2019), <https://www.cleveland.com/open/2019/06/ohio-bills-would-lift-marital-exemptions-statute-of-limitations-on-rape.html> [<https://perma.cc/36XE-ZEKD>].

297. *Id.*

298. S. 162, 133d Gen. Assemb., Reg. Sess. (Ohio 2019); H. 279, 133d Gen. Assemb., Reg. Sess. (Ohio 2019).

299. Smyth & Karnowski, *supra* note 282.

300. See *Senate Bill 162 - Status*, OHIO LEGISLATURE, <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-SB-162> [<https://perma.cc/BCY5-KEHU>] (last visited Mar. 25, 2021); *House Bill 279 - Status*, OHIO LEGISLATURE, <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HB-279> [<https://perma.cc/78BM-F383>] (last visited Mar. 25, 2021).

301. Jim Small, *Farnsworth Accused of Trying to Protect Spousal Rape. Not for the First Time.*, AZ MIRROR (Feb. 24, 2020, 8:39 AM), <https://www.azmirror.com/blog/farnsworth-accused-of-trying-to-protect-spousal-rape-not-for-the-first-time/> [<https://perma.cc/G9MG-NDHL>].

302. *Id.*

2005, he told the executive director of the Arizona Sexual Assault Network that “[s]ome would argue there are conjugal rights that exist within a marriage.”³⁰³

A similar bill was before the North Dakota legislature.³⁰⁴ State Representative Kim Koppelman proposed an amendment to the bill which would prevent the nonrapist spouse from terminating the other’s parental rights.³⁰⁵ Echoing the marital privacy justification, State Representative Koppelman stated, “[C]ourts should not disrupt the family where two people for whatever reason have decided to remain married.”³⁰⁶ After an outcry, the legislature removed the amendment from the bill.³⁰⁷

C. Influences to Repeal

Most lawmakers who have proposed legislative efforts to repeal spousal exemptions did not explicitly cite #MeToo as their reason for doing so. It appears that decision has to do with the #MeToo movement’s association with workplace harassment and not spousal sexual violence. But, when explaining why they favored a repeal of spousal exemptions, the lawmakers seemed influenced by an awareness of sexual violence in their states. This awareness is most likely visible due to the #MeToo movement’s impact.

For example, in Michigan, State Representative Laurie Pohutsky stated that “[t]here’s been this effort over the last couple of years to really start addressing the issue of sexual assault and rape.”³⁰⁸ Similarly, in Ohio, State Senator Nickie Antonio said, “We believe that now, more than ever, the public is on the side of removing the artificial line in the sand that prevents a survivor from coming forward.”³⁰⁹ These statements suggest that the #MeToo movement and its broader implications of placing sexual violence at the forefront of our public discourse may be making an effect.

Advocates, on the other hand, have cited the #MeToo movement as a way for people to understand the need for repeal. In Maryland, the legal director at the Women’s Law Center of Maryland, Laure Ruth, stated that the movement “has

303. *Id.*

304. S. 2185, 66th Leg. Assemb., Reg. Sess. (N.D. 2019).

305. Daniela Hurtado, *Amendment to Parental Rights Bill Causes Concern*, KFYR (Mar. 29, 2019, 5:06 PM), <https://www.kfyrtv.com/content/news/Amendment-to-Senate-bill-causes-concern-507861971.html> [<http://web.archive.org/web/20190523175911/https://www.kfyrtv.com/content/news/Amendment-to-Senate-bill-causes-concern-507861971.html>].

306. *Id.*

307. John Hageman, *In Reversal, North Dakota Lawmakers Remove Controversial Bill Amendment on Rapist Parental Rights*, BISMARCK TRIB. (Apr. 1, 2019), https://bismarcktribune.com/news/local/govt-and-politics/in-reversal-north-dakota-lawmakers-remove-controversial-bill-amendment-on/article_59671d5d-c3b4-5a60-87a7-05d63053eb8f.html [<https://perma.cc/2WVK-BLLL>].

308. Tankersley, *supra* note 293.

309. Hancock, *supra* note 296. Although, a different state representative stated a few months earlier that “the #MeToo movement has more of a chilling effect.” Mattie Quinn, *Marital Rape Isn’t Necessarily a Crime in 12 States*, GOVERNING (Apr. 10, 2019), <https://www.governing.com/topics/public-justice-safety/gov-marital-rape-states-ohio-minnesota.html> [<https://perma.cc/29V6-EZZL>].

helped educate people about what is and isn't acceptable in terms of sexual interactions."³¹⁰ In Kansas, the program director at the YWCA Center for Safety and Empowerment, Michelle McCormick, has stated that the country has "come to grips . . . with how much trauma and abuse occurs due to the lack of understanding or misguided beliefs about consent."³¹¹ Thus, the comments from both lawmakers and advocates indicate that awareness of these issues can influence a repeal of spousal exemptions and protect spouses against the current state-sanctioned abuse.

Awareness regarding spousal rape has proven to work.³¹² Once Minnesota lawmakers became aware of the state's voluntary relationship exemption, there was a unanimous repeal.³¹³ However, awareness is not enough. Arguably, the #MeToo movement has hit workplaces the hardest, and yet studies have shown that there have not been many tangible differences put in place at these institutions.³¹⁴ Many of the men shamed out of lucrative positions are coming back into the public eye.³¹⁵ Furthermore, within the first year of #MeToo, federal and state legislatures only passed twenty-three more bills targeting sexual assault than they did the previous year.³¹⁶ Therefore, awareness of the issue is only the first step in what needs to be a multipronged solution.

310. Jeff Barnes, *Maryland Lawmakers Look to Repeal State's 'Archaic' Sex Laws*, AP (Jan. 23, 2020), <https://apnews.com/93c855ac3d1ccfb904a1020a7e7795ee> [<https://perma.cc/3G3M-73JM>] (stating that "[p]eople know what consent is now, or should know what consent is now").

311. Dixon, *supra* note 273.

312. See Zraick, *supra* note 258.

313. *Id.*

314. The study found that thirty-one percent of respondents believed that nothing has changed in their workplace. Men seem to think that the slight changes made to mostly sexual harassment policies have helped more than women do, with forty-nine percent of men saying that "men support women more because of increased awareness" while fifty-three percent of women say that they do not feel more respected. HAVE HER BACK, THE #METOO EFFECT: DO WOMEN AND MEN THINK GENDER EQUITY IS ADVANCING IN THEIR WORKPLACE? (2019), https://haveherback.com/static/downloads/Have-Her-Back-Consulting_MeToo-Survey.pdf [<https://perma.cc/JLC3-4MFG>]; Mary Beth Ferrante, *Two Years After #MeToo Started, Report Finds Companies Are Not Taking Enough Action*, FORBES (Nov. 13, 2019, 2:00 PM), <https://www.forbes.com/sites/marybethferrante/2019/11/13/two-years-after-metoo-started-report-finds-companies-are-not-taking-enough-action/#7c22827f5981> [<https://perma.cc/MD3H-VNPL>]. Another survey found that many companies have yet to institute policies surrounding sexual harassment. And those that do are often "ineffective, and even archaic." Olivia Balsamo, *The #MeToo Movement Is Changing the Corporate World: Survey*, YAHOO! FIN. (Nov. 21, 2019), <https://finance.yahoo.com/news/the-me-too-movement-is-changing-the-corporate-world-says-sap-exec-222632466.html> [<https://perma.cc/FYH4-S2H3>].

315. Madison Feller, *These High-Profile Men Were Brought Down by #MeToo. Now They're Plotting Their Comebacks.*, ELLE (Aug. 28, 2018), <https://www.elle.com/culture/career-politics/a20710282/men-planning-me-too-comebacks-harvey-weinstein/> [<https://perma.cc/ABJ8-J537>].

316. Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More than a Year.*, USA TODAY (Oct. 5, 2018, 12:28 PM), <https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/> [<https://perma.cc/9G2B-372A>] (examining the bills passed within a year from Alyssa Milano's tweet and finding that between both the Federal Legislature and state legislatures, 261 laws were passed addressing sexual violence while in the year before, the federal legislature and state legislatures only passed 238 laws; Congress did not pass any laws related to workplace sexual harassment, a cornerstone of the recent #MeToo movement).

IV. ELIMINATING THE ALLOWANCE OF SPOUSAL SEXUAL VIOLENCE

As Christina Kennedy and Deena Hausner explain in *My Husband Raped #MeToo*, lawmakers should design laws “to offer the highest level of support and protections to all survivors of sexual violence.”³¹⁷ It is time that lawmakers fully repeal the various legislative exemptions stated in Part III. As the country elects more women to federal and state legislatures and as our social consciousness about consent and sexual violence grows, I am hopeful that a full repeal is within reach.³¹⁸ Repeal of spousal exemptions gives victims a remedy for the abuse that they suffer if they desire to pursue a legal solution. For example, after repeal in Minnesota, the Minnesota Sentencing Guidelines Commission concluded that repeal would result in an additional seven convictions annually.³¹⁹ Spouses will not receive a legal remedy, however, if legislatures continue to carve out loopholes under the guise of repeal.³²⁰ These carve-outs are evident in Part II and, as shown in Part III, continue to this day. These small carve-outs hinder advancement toward full repeal. Studies show that “an increase in the number of prior, weaker changes to a state’s marital rape law significantly *decreases* a state’s likelihood of completely eliminating the spousal exemption . . . by about 60 percent.”³²¹

While repeal provides a legal remedy, a full repeal will not be enough to eradicate spousal sexual violence. After repeal, if the statutes are unenforced, then the lack of intervention essentially creates an extralegal spousal privilege. However, enforcement mechanisms as they currently stand present serious issues and need reform to create more meaningful change.³²² The effects of the previous

317. Kennedy & Hausner, *supra* note 29, at 59 (“The continued disparity in the treatment of marital rape has important symbolic value, for it indicates that the law continues to view rape by an intimate partner as less serious and less of a crime than stranger rape.”).

318. Studies have shown that the “percent of legislators who are women . . . are not significant predictors” in the elimination of spousal rape laws. But, that is since men far outweighed the number of women, not that women are not “more committed than male legislators to advancing women’s interests.” McMahan-Howard et al., *supra* note 125, at 518.

319. The bill’s sponsor stated, “That is seven people who are not getting the justice they are due because of this law.” Tim Walker, *House OKs Bill to Eliminate ‘Marital Exception’ in Sexual Misconduct Cases*, MINN. LEGISLATURE: MINN HOUSE REPRESENTATIVES (Feb. 21, 2019, 5:20 PM), <https://www.house.leg.state.mn.us/SessionDaily/Story/13642> [<https://perma.cc/74UA-WN8S>].

320. While it is abhorrent that spousal sexual violence against the disabled is permitted, a full repeal of statutes dealing with mental incapacity could have serious implications. Currently, spouses who may not be able to consent and do not want to consent do not have a path to justice. However, a full repeal could hurt spouses who may not be deemed able to consent and want to. *See* Sofia Barrett-Ibarria, *People with Down Syndrome Need Healthy Sex Lives, Too*, VICE (Jan. 12, 2018, 2:51 PM), https://www.vice.com/en_us/article/nc49mk/sex-dating-and-down-syndrome [<https://perma.cc/M55B-4ME9>]. Thus, when legislatures are faced with repeal of these disability spousal exemptions, they must be cognizant of the difficult circumstances surrounding consent. *See* Tankersley, *supra* note 293 (explaining that the Michigan legislature is grappling with these issues.).

321. McMahan-Howard et al., *supra* note 125, at 520.

322. Awareness, repeal, and reform must be performed simultaneously for effective elimination of spousal rape. *See* Warfield, *supra* note 59 (“I just don’t think that you can policy your way, or legislate your way, into teaching somebody to treat another person as a human being.”); Spohn, *supra* note 124, at 129.

rape-reform movement are instructive on the shortcomings of relying on legislation only. Studies on the impact of the previous reform bills found little change regarding reporting.³²³ Survivors of sexual violence do not report because the consequences “outweigh the benefits.”³²⁴ After reporting their abuse to authorities, survivors fear social stigma, retaliation, and traumatic recounting.³²⁵ If more survivors reported their abuse, there may be a large decrease in the amount of violence that they receive. A study found that women who contacted police or applied for protective orders after their first rape were less likely to experience intimate partner rape again.³²⁶

Sexual violence between intimate partners exacerbates reporting issues.³²⁷ In intimate partner relationships, seventy-seven percent of completed and attempted rapes and seventy-five percent of sexual assaults go unreported, compared to fifty-four percent of completed rapes, forty-four percent of attempted rapes, and thirty-four percent of sexual assaults by strangers.³²⁸ Survivors may also feel that reporting is a waste of time due to the limited number of rapes that are penalized. According to the Rape, Abuse & Incest National Network (RAINN), those who commit crimes of sexual violence are far less likely to be incarcerated than those who commit any other crime.³²⁹ RAINN reports that out of every 1,000 sexual assaults, only 5 cases will lead to a felony conviction, only 46 reports will lead to arrest, and only 230 assaults will be reported to police.³³⁰

These issues stem from the various mechanisms that fail survivors. Dispatchers do not receive substantial training and downgrade rape when coding crimes.³³¹ The police have a history of not helping survivors effectively.³³²

323. Spohn, *supra* note 124, at 129 (“One study showed that the reforms had no impact in five of six major urban jurisdictions studied.”). There was a slight increase in the number of arrests and convictions. Morgan Namian, *Hypermasculine Police and Vulnerable Victims: The Detrimental Impact of Police Ideologies on the Rape Reporting Process*, 40 WOMEN’S RTS. L. REP. 80, 84 (2018).

324. Namian, *supra* note 323, at 82.

325. Jackson, *supra* note 53, at 193; *see* Namian, *supra* note 323, at 82; McBride, *supra* note 22, at 37.

326. The study found that if women contacted police, they were fifty-nine percent less likely to be raped again, and if they applied for a protective order, they were seventy percent less likely to be raped again. Lauren R. Taylor & Nicole Gaskin-Laniyan, *Sexual Assault in Abusive Relationships*, 256 NAT’L INST. JUST. J. 12, 13 (2007).

327. *See* BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 3 (2002).

328. *Id.*

329. *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/4RNL-SWPE>] (last visited Dec. 17, 2019).

330. *Id.*

331. Soraya Chemaly, *How Police Still Fail Rape Victims*, ROLLING STONE (Aug. 16, 2016, 8:29 PM), <https://www.rollingstone.com/culture/culture-features/how-police-still-fail-rape-victims-97782/> [<https://perma.cc/NE89-PCTK>].

332. Namian, *supra* note 323, at 84 (“[P]olice officers play a crucial gatekeeping role in determining whether victims will have access to justice . . .”). The Baltimore Police Department offers an illuminating example of how police treat survivors of sexual violence. In a 2016 report, the Department of Justice (DOJ) found that the Baltimore Police Department humiliated those who

Additionally, some prosecutors actively work against those who report,³³³ and the judiciary does not have the best record when it comes to upholding the rule of law against offenders.³³⁴ Moreover, societal attitudes toward sex in marriage influence juries to be skeptical of those who bring their cases to trial.³³⁵

As many feminist activists and scholars note, however, there is a danger in relying on the criminal justice system to eliminate sexual violence.³³⁶ This reluctance is rooted in the reality that the criminal justice system focuses “nearly exclusively on punishing criminals and virtually ignores forgiveness, victim healing, elimination of socio-economic predicates of crime, and victim social services.”³³⁷ Therefore, repeal and reform must be done for those who wish to pursue a legal remedy, but community, noncarceral approaches must also be pursued to eradicate spousal sexual violence.

CONCLUSION

The #MeToo movement has been transformational. Topics thought to be offensive are now within our national conversation; however, this conversation must help spouses. As this Note demonstrates, spousal exemptions still exist in the

reported and did not adequately investigate survivor’s claims. Some officers went as far as siding with the perpetrators, including questioning a survivor, “Why are you messing that guy’s life up?” The report also states that instead of taking sex workers seriously, the officers forced them to perform sexual acts to avoid arrest. These issues are not exclusive to Baltimore, as the DOJ has found similar actions taken in New Orleans and Missoula. Sheryl Gay Stolberg & Jess Bidgood, *Some Women Won’t ‘Ever Again’ Report a Rape in Baltimore*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/12/us/baltimore-police-sexual-assault-gender-bias.html> [https://perma.cc/7UA9-SKMP]; Chemaly, *supra* note 331.

333. The Baltimore study found email exchanges between a prosecutor and police officer referring to a survivor as a “conniving little whore.” Stolberg & Bidgood, *supra* note 332.

334. After drugging, raping, and videotaping his wife, David Wise was sentenced to house arrest. Here, Judge Eisgruber instructed the survivor to “forgive” Wise. Goodwin, *supra* note 47, at 328; see also Brandon Stahl, Jennifer Bjorhus & MaryJo Webster, *Rapists Who Know Their Victims Often Receive Lighter Sentences in Minnesota’s Courts*, STAR TRIB. (Dec. 6, 2018), <http://www.startribune.com/in-minnesota-convicted-for-rape-free-from-prison-time-denied-justice-part-seven/501636921/> [https://perma.cc/MBP8-8WFC] (finding thirty-two percent of acquaintance rape cases received reduced sentences where only sixteen percent of stranger rape cases received reduced sentences).

335. Since 2013, only nineteen men in Iowa have been charged with spousal rape and only one went to trial. In one example, the jury found that the husband was not guilty on all six counts, even though the wife testified that he “came up behind her and wrapped his arms around her, pinning her hands to her side so she couldn’t move. He walked her to the bed they once shared and pushed her, face down, onto it” and then “forced himself inside her.” Kathy A. Bolten, *An Iowa Woman Said Her Husband Repeatedly Raped Her. Almost No One Believed Her. She’s Not Alone.*, DES MOINES REG. (Jan. 30, 2019, 10:34 AM), <https://www.desmoinesregister.com/story/news/investigations/2019/01/24/domestic-violence-iowa-courts-me-too-spousal-sexual-abuse-marital-rape-sex-intimate-partner-assault/2524826002/> [https://perma.cc/RA43-YG5R].

336. Alta Viscomi, *System Accountability and Sexual Assault: The Past and Future of the Criminal Justice System*, 22 RICH. PUB. INT. L. REV. 173, 188 (2019) (“As symbolically powerful as new legal language was, many critical feminist scholars believe that these legal and legislative victories came at a high cost.”).

337. Gruber, *supra* note 165, at 615.

United States. To combat this, state legislatures must repeal the current loopholes, societal beliefs about marriage and consent must change, and those tasked with enforcing the laws must be sympathetic to survivors' needs. And if those changes are not implemented, those who are married may continue to tweet "#MeToo."

In the Appendix, table 1 provides the current state statutes regarding spousal sexual violence. The table is separated by the categories explained in Part III. For example, the information under "Supervisory Role" may define what roles perpetrators may have where spousal sexual contact is allowed. Additionally, the table provides the year of the most recent reform of the state's spousal sexual violence laws. For example, as of 2019, Alabama's rape statutes no longer contain a spousal exemption.

APPENDIX A

Table 1: Spousal Sexual Violence Laws in 2021

*Note: In Progress labeled as “IP.”

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Alabama	2019	—	—	—	—
Alaska	2019	—	—	Defense if the offender is employed in a state correctional facility, or a peace officer, a probation or parole officer and engages in sexual penetration with a person with reckless disregard that the person is in the custody of the offender. ³³⁸	Defense that the “victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.” ³³⁹

338. ALASKA STAT. § 11.41.425(a) (2020); *see also id.* § 11.41.432(d).339. *Id.* § 11.41.445(a).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
	Arizona	<p>2005</p> <p>Defense to a prosecution of sexual abuse and sexual conduct with a minor "that the person <i>was the spouse</i> of the other person at the time of commission of the act. It is not a defense to a prosecution [of sexual assault] that the defendant <i>was the spouse</i> of the victim at the time of commission of the act."³⁴⁰</p>	—	<p>Unlawful sexual conduct statute does not apply to "[a]n officer <i>who is married to or who is in a romantic or sexual relationship with the person</i> at the time of the arrest or investigation."³⁴¹</p>	<p>Defense to committing "sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age"³⁴² when that minor is the "<i>spouse of the other person</i> at the time of commission of the act."³⁴³</p>

340. ARIZ. REV. STAT. ANN. § 13-1407(D) (2021) (emphasis added).

341. *Id.* § 13-1412(C)(2) (emphasis added).

342. *Id.* § 13-1405(A).

343. *Id.* § 13-1407(D) (emphasis added).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Arkansas	—	—	—	<p>"[S]exual assault in the first degree if . . . [t]he person engages in sexual intercourse or deviate sexual activity with a minor <i>who is not the actor's spouse</i> and the actor is . . . [e]mployed with the Division of Correction, the Division of Community Correction, the Department of Human Services, or any city or county jail or a juvenile detention facility . . . and the actor is supervising the minor while the minor is on probation or parole or for any other court-ordered reason."³⁴⁴ Similarly, a mandated reporter, an employee in the victim's school or school district, a temporary caretaker, a teacher, principal, athletic coach, or counselor in a public or private school in kindergarten through grade twelve and the actor</p> <p>"[e]ngages in sexual intercourse or deviate sexual activity with a person <i>who is not the actor's spouse</i> and the victim is . . . [a] student enrolled in the public or private school employing the actor; and [i]s in a position of trust or authority over the victim and uses his or her position of trust or authority over the victim to engage in sexual intercourse or deviate sexual activity."³⁴⁵</p>	<p>"[S]exual assault in the second degree if the person . . . [e]ngages in sexual contact with another person who is . . . less than fourteen (14) years of age; and [n]ot <i>of the person's spouse</i>."³⁴⁶</p>

344. ARK. CODE ANN. § 5-14-124(a)(1)(A)–(B) (2021) (emphasis added) (sexual assault first-degree).
 345. *Id.* § 5-14-124(a)(1)(C)–(2)(B) (emphasis added).
 346. *Id.* § 5-14-125(a)(3) (emphasis added) (sexual assault second-degree).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
California	—	Prohibits rape of a spouse under a number of circumstances including by force, intoxication, unconsciousness, and by threat. ³⁴⁷	—	—	"Unlawful sexual intercourse is . . . accomplished with a person <i>who is not the spouse</i> of the perpetrator, if the person is a minor." ³⁴⁸
Colorado	—	"Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense . . . unless such defense is specifically set forth in the applicable statutory section." ³⁴⁹	—	—	"Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if . . . the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or . . . the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and <i>is not the spouse of the victim.</i> " ³⁵⁰

347. CAL. PENAL CODE § 262(a) (West 2021) (rape-spouse).

348. *Id.* § 261.5(a) (emphasis added) (unlawful sexual intercourse minor).

349. COLO. REV. STAT. § 18-3-409 (2020) (marital defense).

350. *Id.* § 18-3-402(1)(d)–(e) (emphasis added) (sexual assault).

Recent reform	Different Spousal statute	Impairment	Supervisory role	Statutory rape
Connecticut	—	<p>"In any prosecution for an offense . . . based on the victim's being mentally incapacitated, physically helpless or impaired because of mental disability or disease, it shall be an affirmative defense that the actor, at the time such actor engaged in the conduct constituting the offense, did not know of the condition of the victim . . . [and] it shall be an affirmative defense that the defendant and the alleged victim were . . . <i>living together by mutual cohabitation, regardless of the legal status of their relationship.</i>"³⁵¹</p>	<p>"[I]f such person subjects another person to sexual contact . . . and [is] responsible for the general supervision of such other person's welfare, or . . . has supervisory or disciplinary authority over [someone who is in custody of law or detained in a hospital or other institution], . . . or such person is a psychotherapist and subjects another person to sexual contact," they can be guilty of sexual assault in the fourth degree.³⁵²</p>	<p>"[A]ffirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, <i>living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship</i>"³⁵³ for aggravated sexual assault of a minor when the "victim of such offense is under thirteen years of age, and (1) such person kidnapped or illegally restrained the victim, (2) such person stalked the victim, (3) such person used violence to commit such offense against the victim, (4) such person caused serious physical injury to or disfigurement of the victim, (5) there was more than one victim of such offense under thirteen years of age, (6) such person was not known to the victim, or (7) such person has previously been convicted of a violent sexual assault."³⁵⁴</p>

351. CONN. GEN. STAT. § 53a-67 (2021) (emphasis added) (affirmative defenses).

352. *Id.* § 53a-73a(a) (sexual assault fourth-degree).

353. *Id.* § 53a-67(b) (emphasis added).

354. *Id.* § 53a-70c(a) (aggravated sexual assault-minor).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Delaware	—	—	—	—	"[R]ape in the fourth degree when the person . . . [i]ntentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's eighteenth birthday, and the person is 30 years of age or older, except that such intercourse <i>shall not be unlawful if the victim and person are married at the time of such intercourse.</i> " ³⁵⁵
Florida	—	—	—	—	—

355. DEL. CODE ANN. tit. 11, § 770(a)(2) (2021) (emphasis added) (rape fourth-degree).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Georgia	—	"The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape." ³⁵⁶	—	The improper sexual contact statute by an employee or agent does not apply between married individuals. ³⁵⁷	"[S]tatutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and <i>not his or her spouse</i> ." ³⁵⁸

356. GA. CODE ANN. § 16-6-1(a) (2020) (improper sexual contact).

357. *Id.* § 16-6-5.1(e)(1).

358. *Id.* § 16-6-3(a) (emphasis added) (statutory rape).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Hawaii	—	"[S]exual assault in the fourth degree if . . . [t]he person knowingly subjects another person, <i>not married to the actor</i> , to sexual contact by compulsion or causes another person, <i>not married to the actor</i> , to have sexual contact with the actor by compulsion." ³⁵⁹	"[S]exual assault in the second degree if [t]he person knowingly subjects to sexual penetration a minor who is at least sixteen years old and the person is contemporaneously acting in a professional capacity to instruct, advise, or supervise the minor; provided that: [t]he person is not less than five years older than the minor; and <i>the person is not legally married to the minor.</i> " ³⁶⁰	"[S]exual assault in the first . . . [t]he person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that: [t]he person is not less than five years older than the minor; and [t]he person is <i>not legally married to the minor</i> ." ³⁶¹ and "sexual assault in the third degree if . . . [t]he person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that: [t]he person is not less than five years older than the minor; and [t]he person is <i>not legally married to the minor.</i> " ³⁶²

359. HAW. REV. STAT. § 707-733(1)(a) (2021) (emphasis added) (sexual assault fourth-degree).
 360. *Id.* § 707-731(1)(d) (emphasis added) (sexual assault second-degree).
 361. *Id.* § 707-730(1)(c) (emphasis added) (sexual assault first-degree).
 362. *Id.* § 707-732(1)(c) (emphasis added) (sexual assault third-degree).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Idaho	IP*	"No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in" certain subsections of the Idaho Code. ³⁶³	"No person shall be convicted of rape for any act or acts <i>with that person's spouse</i> . ³⁶⁴ "[w]here the victim is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent, of giving legal consent." ³⁶⁵	—	"No person shall be convicted of rape for any act or acts with that person's spouse." ³⁶⁶ "[w]here the victim is under the age of sixteen (16) years and the perpetrator is eighteen (18) years of age or older." ³⁶⁷
Illinois	—	—	—	Sexual misconduct statute does not apply to "any State employee or any community agency employee <i>who is lawfully married to a person with a disability in custody of the Department of Human Services or receiving services from a community agency</i> ." ³⁶⁸	—

363. IDAHO CODE § 18-6107 (2021) (rape-spouse).

364. *Id.* (emphasis added).365. *Id.* § 18-6101(3) (rape).366. *Id.* § 18-6107 (emphasis added).367. *Id.* § 18-6101(1).

368. 720 ILL. COMP. STAT. 5/11-9.5(d)(1) (2020) (emphasis added) (sexual misconduct-disability).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Indiana	—	—	—	—	—
Iowa	—	"[S]exual abuse in the third degree when the person performs a sex act . . . [and t]he act is done by force or against the will of the other person, <i>whether or not the other person is the person's spouse or is cohabiting with the person.</i> " ³⁶⁹	"[S]exual abuse in the third degree when the person performs a sex act . . . between persons <i>who are not at the time cohabiting as husband and wife</i> and . . . [t]he other person is suffering from a mental defect or incapacity which precludes giving consent." ³⁷⁰	"[S]exual abuse in the third degree when the person performs a sex act . . . [and t]he act is between persons <i>who are not at the time cohabiting as husband and wife</i> . . . [i]f t]he person is in a position of authority over the other person and uses that authority to coerce the other person to submit." ³⁷¹	"[S]exual abuse in the third degree when the person performs a sex act . . . [and t]he act is between persons <i>who are not at the time cohabiting as husband and wife</i> . . . [i]f t]he other person is twelve or thirteen years of age." ³⁷²

369. IOWA CODE § 709.4(1)(a) (2020) (emphasis added) (sexual abuse third-degree).

370. *Id.* § 709.4(1)(b)(1) (emphasis added).

371. *Id.* § 709.4(1)(b)(3)(c) (emphasis added).

372. *Id.* § 709.4(1)(b)(2) (emphasis added).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Kansas	PP*	—	<p>"Unlawful sexual relations is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person <i>who is not married to the offender</i> if . . . [t]he offender is an employee or volunteer of the department of corrections, . . . a parole officer, . . . a law enforcement officer, an employee of a jail, . . . juvenile detention facility or sanctions house, . . . the Kansas department for aging and disability services or the Kansas department for children and families, . . . a worker, volunteer or other person in a position of authority in a family foster home licensed by the department of health and environment, . . . a teacher, or other person in a position of authority."³⁷⁴</p>	<p>Marriage is a defense to sexual intercourse with a child who is younger than fourteen.³⁷⁵</p>
	<p>"Sexual battery is the touching of a victim <i>who is not the spouse of the offender</i>, who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another."³⁷³</p>			

373. KAN. STAT. ANN. § 21-5505(a) (2021) (emphasis added) (sexual battery).

374. *Id.* § 21-5512(a)(1)–(4), (7)–(9) (emphasis added) (unlawful sexual relations).

375. *Id.* § 21-5503(a)(3), (d) (rape).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Kentucky	—	"A person who engages in sexual intercourse or deviate sexual intercourse with another person <i>to whom the person is married, or subjects another person to whom the person is married</i> to sexual contact, does not commit an offense under this chapter regardless of the person's age solely because the other person is less than sixteen . . . years old or an individual with an intellectual disability." ³⁷⁶	See "Different Spousal Statute." ³⁷⁷	—	See "Different Spousal Statute." ³⁷⁸

376. KY. REV. STAT. ANN. § 510.035 (West 2021) (emphasis added) (exception).

377. *Id.*

378. *Id.*

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Louisiana	2015	—	—	—	"Oral sexual battery is the intentional touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender, or the touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim, when . . . [t]he victim, <i>who is not the spouse of the offender</i> , is under the age of fifteen years and is at least three years younger than the offender." ³⁷⁹

379. LA. STAT. ANN. § 14:43.3(A)(1) (2020) (emphasis added) (oral sexual battery).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Maine	—	—	—	<p>"[G]ross sexual assault if that person engages in a sexual act with another person and . . . [t]he other person, <i>not the actor's spouse</i>, is under official supervision as a probationer, a parolee, a sex offender on supervised release, a prisoner on supervised community confinement status or a juvenile on community reintegration status or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over the other person . . . [or] is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student."³⁸⁰</p>	<p>"[G]ross sexual assault if that person engages in a sexual act with another person and . . . [t]he other person, <i>not the actor's spouse</i>, has not in fact attained . . . 14 . . . [or] 12 years of age."³⁸¹</p>

380. ME. STAT. tit. 17-A, § 253(2)(E)–(F) (2021) (emphasis added) (gross sexual assault).
 381. *Id.* tit. 17-A, § 253(1)(B)–(C) (emphasis added).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Maryland	IP*	A person may not be prosecuted under certain statutes "for a crime against a victim <i>who was the person's legal spouse</i> at the time of the alleged rape or sexual offense" unless they are living apart or force was used. ³⁸²	A person may not be prosecuted for engaging "in sexual contact with another if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual" <i>if the victim is the person's legal spouse</i> at the time of the offense. ³⁸³	"[A] person in a position of authority may not engage in a sexual act or sexual contact with a minor who, at the time of the sexual act or sexual contact, is a student enrolled at a school where the person in a position of authority is employed" unless <i>the victim is the person's legal spouse</i> at the time of the offense. ³⁸⁴	A person may not be prosecuted for a sexual act with another if the victim is fourteen and the person performing the sexual act is at least four years older than the victim <i>if the victim is the person's legal spouse</i> at the time of the offense. ³⁸⁵
Massachusetts	—	—	—	—	—

382. MD. CODE ANN., CRIM. LAW § 3-318(a)–(b) (West 2021) (emphasis added) (rape and sexual offense spousal defense).

383. *Id.* § 3-307(a)(2) (sexual offense third-degree); *id.* § 3-318(a).

384. *Id.* § 3-308(c)(1) (sexual offense fourth-degree); *id.* § 3-318(a).

385. *Id.* §§ 3-307(a)(3), -318(a).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Michigan	<p>"A person may be charged and convicted . . . even though the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incapable, or mentally incapacitated."³⁸⁶</p>	<p>See "Different Spousal Statute."³⁸⁷</p>	<p>"Criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and . . . [t]hat other person is at least 16 years old but less than 26 years of age and is receiving special education services, and either of the following applies: [t]he actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of that public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph <i>does not apply if both persons are lawfully married to each other</i> at the time of the alleged violation."³⁸⁸</p>	<p>See "Different Spousal Statute."³⁸⁹</p>

386. MICH. COMP. LAWS § 750.520/ (2021) (offenses involving spouses).

387. *Id.*

388. *Id.* § 750.520e(1)(g)(i) (emphasis added) (criminal sexual conduct fourth-degree).

389. *Id.* § 750.520/.

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Minnesota	2019	—	—	Criminal sexual conduct if "the actor is or purports to be a member of the clergy, the complainant is <i>not married to the actor</i> , and . . . the sexual contact occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or the sexual contact occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense." ³⁹⁰	—

390. MINN. STAT. § 609.345(1)(j) (2021) (emphasis added) (criminal sexual conduct in the fourth degree).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Mississippi	<p>A person is not guilty of any offense under sexual battery statutes "if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim."³⁹¹</p>	<p>"A person is guilty of sexual battery if he or she engages in sexual penetration with . . . [a] mentally defective, mentally incapacitated or physically helpless person."³⁹²</p>	<p>"A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach."³⁹³</p>	<p>"A person is guilty of sexual battery if he or she engages in sexual penetration with . . . [a] child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or a child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child."³⁹⁴</p>

391. MISS. CODE ANN. § 97-3-99 (2021) (emphasis added) (sexual battery, defense of marriage).

392. *Id.* § 97-3-95(1)(b) ("sexual battery" defined).

393. *Id.* § 97-3-95(2).

394. *Id.* § 97-3-95(1)(c)-(d).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Missouri	2014	"It shall be an affirmative defense to [certain] prosecutions [(see "Statutory Rape" ³⁹⁵)] . . . that <i>the defendant was married to the victim</i> at the time of the offense." ³⁹⁶	—	—	"A person commits the offense of statutory rape in the first degree if he or she has sexual intercourse with another person who is less than fourteen years of age." ³⁹⁷ "A person commits the offense of statutory rape in the second degree if being twenty-one years of age or older, he or she has sexual intercourse with another person who is less than seventeen years of age." ³⁹⁸ "A person commits the offense of child molestation in the fourth degree if, being more than four years older than a child who is less than seventeen years of age, subjects the child to sexual contact." ³⁹⁹

395. MO. REV. STAT. § 566.032(1), .034(1), .071 (2020).

396. *Id.* § 566.023 (emphasis added) (marriage to victim, at time of offense, affirmative defense, for certain crimes).

397. *Id.* § 566.032(1).

398. *Id.* § 566.034(1).

399. *Id.* § 566.071(1).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Montana	—	—	<p>A victim is incapable of consent because the victim is, <i>except for in marriage</i>, "incarcerated in a . . . correctional, detention, or treatment facility or is on probation, conditional release, or parole and the perpetrator is an employee . . . or volunteer of the supervising authority . . . [is] receiving services from a youth care facility . . . and the perpetrator . . . [is] providing treatment to the victim; and is an employee . . . or volunteer of the youth care facility; [is] admitted to a mental health facility, . . . a community-based facility or a residential facility . . . and the perpetrator . . . is providing treatment to the victim; and is an employee, . . . or volunteer of a facility . . . ; [is] a program participant . . . in a private alternative adolescent residential or outdoor program, . . . and the perpetrator is a person associated with the program; . . . is a client receiving psychotherapy services and the perpetrator . . . is providing or purporting to provide psychotherapy services . . . ; [is] a student of an elementary, middle, junior high, or high school, whether public or nonpublic, and the perpetrator is not a student of an elementary, middle, junior high, or high school and is an employee, contractor, or volunteer of any school who has ever had instructional, supervisory, disciplinary, or other authority over the student in a school setting."⁴⁰⁰</p>	—

400. MONT. CODE ANN. § 45-5-502(5)(a) (2021) (sexual assault).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Nebraska	—	—	Sexual abuse of an inmate or parolee deals with individuals employed by "the Department of Correctional Services or by the Division of Parole Supervision, . . . and any individual, <i>other than an inmate's spouse</i> , to whom the department has authorized or delegated control over an inmate or an inmate's activities, an individual employed by a city or county correctional or jail facility, including any individual working in central administration of the city or county correctional or jail facility, any individual working under contract with the city or county correctional or jail facility, and any individual, <i>other than an inmate's spouse</i> , to whom the city or county correctional or jail facility has authorized or delegated control over an inmate or an inmate's activities." ⁴⁰¹	—

401. NEB. REV. STAT. §§ 28-322, -322.02 (2021) (emphasis added).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Nevada	—	"It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, <i>married to the victim</i> , if the assault was committed by force or by the threat of force." ⁴⁰²	—	—	—

402. NEV. REV. STAT. § 200.373 (2021) (emphasis added) (sexual assault of spouse by spouse).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
New Hampshire	2020	—	—	—	"A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, <i>not the actor's legal spouse</i> , who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault." ⁴⁰³

403. N.H. REV. STAT. ANN. § 632-A:2(III) (2021) (emphasis added) (aggravated felonious sexual assault).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
New Jersey	—	"No actor shall be presumed to be incapable of committing a crime under [the sexual offenses] chapter because of age or impotency <i>or marriage</i> to the victim." ⁴⁰⁴	—	—	—

404. N.J. STAT. ANN. § 2C:14-5(b) (West 2021) (emphasis added) (provisions generally applicable to chapter 14).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
New Mexico	—	—	—	"Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration . . . perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and <i>not the spouse</i> of that child; or perpetrated on a child thirteen to eighteen years of age when the perpetrator . . . is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer." ⁴⁰⁵	See "Supervisory Role." ⁴⁰⁶

405. N.M. STAT. ANN. § 30-9-11(G) (2021) (emphasis added) (criminal sexual penetration).

406. *Id.*

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
New York	<p>"In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old, mentally disabled, a client or patient and the actor is a health care provider, detained or otherwise in custody of law enforcement . . . or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee, <i>it shall be a defense that the defendant was married to the victim . . .</i>"⁴⁰⁷</p>	—	<p>"A person is deemed incapable of consent when he or she is . . . committed to the care and custody of a local correctional facility, . . . and the actor is an employee, <i>not married to such person</i>, who knows or reasonably should know that such person is committed to the care and custody of such facility."⁴⁰⁸</p>	—

407. N.Y. PENAL LAW § 130.10(4) (McKinney 2021) (defenses); *see also id.* § 130.05(3)(j) (lack of consent).

408. *Id.* § 130.05(3)(f).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
North Carolina	—	"A person may be prosecuted . . . whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense." ⁴⁰⁹	—	—	—
North Dakota	—	—	—	—	—

409. N.C. GEN. STAT. § 14-27.34 (2021) (emphasis added) (no defense that victim is spouse of person committing act).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Ohio	<p>"No person shall engage in sexual conduct with another, <i>not the spouse of the offender</i>, when . . . [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."⁴¹⁰</p> <p>"No person shall have sexual contact with another, <i>not the spouse of the offender</i>, [when] . . . [t]he offender purposely compels the other person, or one of the other persons, to submit by force or threat of force."⁴¹¹</p>	<p>"No person shall engage in sexual conduct with another <i>who is not the spouse of the offender or who is living separate and apart from the offender</i>, when . . . the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception . . . [or] if [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age."⁴¹²</p>	<p>"No person shall engage in sexual conduct with another, <i>not the spouse of the offender</i>, when . . . [the victim] is in custody of law or a patient in a hospital . . . and the offender has supervisory or disciplinary authority over the other person[. . .] [the perpetrator is a person] in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution; . . . the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person[; the offender . . . is a mental health professional, the other person is a mental health client or</p>	<p>"No person shall engage in sexual conduct with another who is <i>not the spouse of the offender or who is living separate and apart from the offender</i>, when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."⁴¹³</p> <p>"No person shall have sexual contact with another, <i>not the spouse of the offender [or] cause of the offender</i>, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when . . . [t]he other person . . . is less than thirteen years of age, whether or not the offender knows the age of that person."⁴¹⁴</p>

410. OHIO REV. CODE ANN. § 2907.03(A)(1) (West 2021) (emphasis added) (sexual battery).
 411. *Id.* § 2907.05(A)(1) (emphasis added) (gross sexual imposition).
 412. *Id.* § 2907.02(A)(1)(a), (c) (emphasis added) (marriage or cohabitation not defenses to rape charges).
 413. *Id.* § 2907.02(A)(1)(b) (emphasis added).
 414. *Id.* § 2907.05(A)(4) (emphasis added).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Ohio	IP*		<p>"No person shall engage in sexual conduct with another, <i>not the spouse of the offender</i>, when . . . [t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired." 415</p>	<p>patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes]; t]he other person is confined in a detention facility, and the offender is an employee of that detention facility]; t]he other person is a minor, the offender is a cleric, and the other person is a member of, or attends, the church or congregation served by the cleric]; or t]he other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person." 416</p>	

415. *Id.* § 2907.03(A)(2) (emphasis added).

416. *Id.* § 2907.03(A)(6), (8)–(13) (emphasis added).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
<p>Oklahoma</p>	<p>Rape is an act of sexual intercourse accomplished with a person "who is not the spouse of the perpetrator . . . [i]f force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person."⁴¹⁷</p>	<p>Rape is an act of sexual intercourse accomplished with a person "who is not the spouse of the perpetrator . . . [w]here the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit . . . [and w]here the victim is at the time unconscious of the nature of the act and this fact is known to the accused."⁴¹⁸</p>	<p>Rape is an act of sexual intercourse accomplished with a person "who is not the spouse of the perpetrator . . . [w]here the victim is under the legal custody or supervision of a state agency, a federal agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, federal, county, municipal or political subdivision employee or an employee of a contractor of the state, the federal government, a county, a municipality or a political subdivision that exercises authority over the victim . . . [j] the victim is at least sixteen (16) years of age and is less than twenty (20) years of age and is a student, or under the legal custody or supervision of any public or private elementary or secondary school, junior high or high school, or public vocational school, and engages in sexual intercourse with a person who is eighteen (18) years of age or older and is an employee of the same school system, . . . [or] the victim is at least sixteen (16) years of age but less than eighteen (18) years of age and the perpetrator of the crime is a person responsible for the child's health, safety or welfare."⁴¹⁹</p>	<p>Rape is an act of sexual intercourse accomplished with a person "who is not the spouse of the perpetrator [w]here the victim is under sixteen (16) years of age."⁴²⁰</p>

417. OKLA. STAT. tit. 21, § 1111(A)(3) (2021) (emphasis added) (rape defined).

418. *Id.* § 1111(A)(4)–(5) (emphasis added).

419. *Id.* § 1111(A)(7)–(8), (10) (emphasis added).

420. *Id.* § 1111(A)(1).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Oregon	—	—	—	—	"A person commits the crime of sexual misconduct if the person engages in sexual intercourse or oral or anal sexual intercourse <i>with an unmarried person</i> under 18 years of age." ⁴²¹
Pennsylvania	—	—	—	—	"[A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if . . . the complainant is less than 16 years of age and the person is four or more years older than the complainant and the person <i>are not married to each other</i> ." ⁴²²

421. OR. REV. STAT. § 163.445(1) (2020) (emphasis added) (sexual misconduct).

422. 18 PA. CONS. STAT. § 3125(a)(8) (2021) (emphasis added) (aggravated indecent assault).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Rhode Island	—	—	"[F]irst degree sexual assault if he or she engages in sexual penetration with another person, and if . . . [t]he accused, <i>not being the spouse</i> , knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless." ⁴²³	—	—

423. 11 R.I. GEN. LAWS § 11-37-2(1) (2020) (emphasis added) (first-degree sexual assault).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
South Carolina	<p>"A person cannot be guilty of criminal sexual conduct . . . if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree . . . The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses."⁴²⁴</p>	<p>"[C]riminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if [the] . . . actor knows or has reason to know that the victim is mentally defective, physically incapacitated, or aggravated force or not used to accomplish sexual battery."⁴²⁵</p>	<p>"[C]riminal sexual conduct with a minor in the second degree if . . . the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim."⁴²⁶</p>	<p>"[C]riminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age; or the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent."⁴²⁷ "A person is guilty of criminal sexual conduct with a minor in the second degree if . . . the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age."⁴²⁸</p>

424. S.C. CODE ANN. § 16-3-658 (2021) (emphasis added) (criminal sexual conduct; when victim is spouse).

425. *Id.* § 16-3-654(1)(b) (criminal sexual conduct in the third degree).

426. *Id.* § 16-3-655(B)(2) (criminal sexual conduct with a minor).

427. *Id.* § 16-3-655(A).

428. *Id.* § 16-3-655(B)(1).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
South Dakota	—	—	—	"Any psychotherapist who knowingly engages in an act of sexual penetration . . . with a person <i>who is not his or her spouse</i> and who is a patient who is emotionally dependent on the psychotherapist at the time that the act of sexual penetration is committed, commits a Class 4 felony." ⁴²⁹	"Any person, sixteen years of age or older, who knowingly engages in sexual contact with another person, <i>other than that person's spouse</i> if the other person is under the age of sixteen years is guilty of a Class 3 felony. If the victim is at least thirteen years of age and the actor is less than five years older than the victim, the actor is guilty of a Class 1 misdemeanor." ⁴³⁰ "No person fifteen years of age or older may knowingly engage in sexual contact with another person <i>other than his or her spouse</i> who, although capable of consenting, has not consented to such contact." ⁴³¹

429. S.D. CODIFIED LAWS § 22-22-29 (2021) (emphasis added) (sexual penetration by psychotherapist).

430. *Id.* § 22-22-7 (emphasis added) (sexual contact with a child under sixteen).

431. *Id.* § 22-22-7.4 (emphasis added) (sexual contact without consent with person capable of consenting).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Tennessee	—	—	—	—	—
Texas	—	—	—	"An employee of a public or private primary or secondary school commits an offense if the employee . . . engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works." ⁴³² "It is an affirmative defense to prosecution under this section that . . . <i>the actor was the spouse of the enrolled person at the time of the offense.</i> " ⁴³³	Affirmative defense if the person "causes the penetration of the anus or sexual organ of a child by any means; causes the penetration of the mouth of a child by the sexual organ of the actor; causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or causes the mouth of a child to contact the anus or sexual organ of another person, including the actor" if the actor was the spouse of the child at the time of the offense. ⁴³⁴

432. TEX. PENAL CODE ANN. § 21.12(a)(1) (West 2019) (improper relationship between educator and student).

433. *Id.* § 21.12(b-1)(1) (emphasis added).

434. *Id.* § 22.011(a)(2), (e)(1) (sexual assault).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Utah	—	"[R]ape when the actor has sexual intercourse with another person without the victim's consent. This section applies <i>whether or not the actor is married to the victim</i> ." ⁴³⁵	—	—	—
Vermont	—	—	—	—	"No person shall engage in a sexual act with a child who is under the age of 16, except . . . <i>where the persons are married to each other</i> and the sexual act is consensual." ⁴³⁶

435. UTAH CODE ANN. § 76-5-402(1)–(2) (West 2021) (emphasis added) (rape).

436. VT. STAT. ANN. tit. 13, § 3252(c)(1) (West 2021) (emphasis added) (sexual assault).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Virginia	2005	<p>"In any case deemed appropriate by the court, all or part of any sentence imposed for a violation . . . <i>against a spouse</i> may be suspended upon the defendant's completion of counseling or therapy, if not already provided, . . . if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness."⁴³⁷</p>	—	—	—

437. VA. CODE ANN. § 18.2-61(B)(2) (2021) (emphasis added) (rape); *id.* § 18.2-67.1(B)(2) (emphasis added) (forcible sodomy).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory ape
Washington	—	—	<p>Rape in the second-degree when the person engages in sexual intercourse with another person and "the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who: [h]as supervisory authority over the victim; or [w]as providing transportation, within the course of his or her employment, to the victim . . . the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination . . . ; . . . [t]he victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator . . . has supervisory authority over the victim; . . . [t]he victim is a frail elder or vulnerable adult . . . who: [t]he perpetrator h[as] a significant relationship with the victim."⁴³⁸</p>	—

438. WASH. REV. CODE § 9A.44.050(1)(c)–(f)(i) (2021) (emphasis added) (rape in the second degree).

Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
West Virginia	Sexual contact is "any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, <i>where the victim is not married to the actor</i> and the touching is done for the purpose of gratifying the sexual desire of either party." ⁴³⁹	Sexual abuse "when such person subjects another person to sexual contact who is mentally defective or mentally incapacitated" ⁴⁴⁰ or "subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or [s]uch person subjects another person to sexual contact who is physically helpless." ⁴⁴¹	—	"[S]exual abuse in the third-degree when he subjects another person to sexual contact without the latter's consent, when such lack of consent is due to the victim's incapacity to consent by reason of being less than sixteen years old." ⁴⁴²

439. W. VA. CODE § 61-8B-1(6) (2021) (emphasis added) (definition of terms).

440. *Id.* § 61-8B-8(a) (sexual abuse in the second degree).

441. *Id.* § 61-8B-7(a)(1)–(2) (sexual abuse in the first degree).

442. *Id.* § 61-8B-9(a) (sexual abuse in the third degree).

	Recent reform	Different spousal statute	Impairment	Supervisory role	Statutory rape
Wisconsin	—	"A defendant shall not be presumed to be incapable of violating [the sexual assault section] because of marriage to the complainant." ⁴⁴³	—	—	—
Wyoming	—	"The fact that the actor and the victim are married to each other is not by itself a defense' to certain violations except what is stated in the following cells." ⁴⁴⁴	"The actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim's conduct." ⁴⁴⁵	"Being eighteen (18) years of age or older, the actor engages in sexual contact with a victim who is less than sixteen (16) years of age and the actor occupies a position of authority in relation to the victim." ⁴⁴⁶	"Being seventeen (17) years of age or older, the actor inflicts sexual intrusion on a victim who is thirteen (13) through fifteen (15) years of age, and the victim is at least four (4) years younger than the actor." ⁴⁴⁷

443. WIS. STAT. § 940.225(6) (2021) (sexual assault).

444. WYO. STAT. ANN. § 6-2-307(a) (2021) (evidence of marriage as defense).

445. *Id.* § 6-2-302(a)(iv) (sexual assault in the first degree).

446. *Id.* § 6-2-315(a)(iv) (sexual abuse of a minor in the second degree).

447. *Id.* § 6-2-315(a)(i).